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Supreme Court, U.S.
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No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX
Volume II, Pages 192 to 416

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EXHIBIT I

REDEPLOYABLE RESOURCES – FINAL – MAY 25, 1993

- No poor performance or problem employees in redeployable group – deal with them now outside of this business process improvement.
- It is Line Management's responsibility to successfully manage their redeployable employees. Human Resources will provide assistance in retraining efforts and outplacement service as part of this partnership.
- Employee can be identified as redeployable by:
  - Position reduction due to business process improvement.
  - Position reduction at holding company.
  - Position reduction resulting from organizational realignment.
- Individual stays in "current" role until *new business process* is implemented.
- Redeployable employees *may* be offered reasonable retraining if necessary to quality for internal positions.
- Redeployable employees remain at current salary for up to six months or until one of the following occurs:
  - Accepts new job offer. If current salary greater than 120% of new job market value, salary will be reduced to the lower amount.
  - If voluntary termination, remainder of six month's salary paid.
  - As a result of placement process individual accepts internal job offer. If external job secured, remainder of six month salary will be paid.
  - Separation at six months after date declared redeployable.

- Non-exempt and exempt employees who are redeployable will be given consideration for all posted job openings prior to official posting using following process:
  - A redeployable individual has to initiate application for job opening.
  - Hiring supervisor and responsible Senior V.P. has to justify why redeployable applicant is not qualified to the present supervisor and supervisor's responsible Senior V.P.
  - If disagreement, goes to President for final review and decision.
- Redeployable employees remain in their department and in the department budget until "six months" event occurs as described earlier. They may be assigned other duties by their departmental management or reassigned to different duties outside their department prior to full-time reassignment to a new position. Where possible, unless assigned to duties elsewhere, redeployable employees should remain in their work area – though *not* in the new business process.
- Redeployable employees should not go through an assessment center process or formal assessment. However, if disagreement over qualifications exists, then a modified targeted selection process will be used.
- HR will do continuous adverse impact analyses and inform senior management of any issues as they arise.
  - Evaluate who is being declared redeployable.
  - Who gets job offers.
  - Who actually is released from Company.

- Bargaining unit employees whose positions are eliminated will not be covered by this process but will be treated consistent with our union contract.

NOTE: DO NOT SEND OUT ANY WRITTEN NOTIFICATIONS OR PUBLICATIONS OF THIS PROGRAM. DO DISCUSS WITH YOUR STAFF AND FEEL FREE TO ANSWER EMPLOYEE QUESTIONS. IF REDEPLOYABLE EMPLOYEES IDENTIFIED, CONFIRM WITH SENIOR V.P. OF THAT AREA.

EXHIBIT J

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, et al., Plaintiffs, -vs- FLORIDA POWER CORP., etc., Defendant.	:	CASE NO. 95-123-Civ-Oc-10A
JAMES AKIN, et al., Plaintiffs, -vs- FLORIDA POWER CORP., etc., Defendant.	:	CASE NO. 97-173-Civ-Oc-10C
	:	Ocala Courthouse May 13, 1998 4:30 p.m.

TRANSCRIPT OF STATUS
CONFERENCE PROCEEDINGS
before
THE HONORABLE WM. TERRELL HODGES
United States District Judge

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[2] PROCEEDINGS

4:30 p.m. May 13, 1998

THE COURT: Good afternoon, counsel.

COUNSEL: Good afternoon, Your Honor (collectively.)

THE COURT: I apologize for the late commencement of this hearing. But as I think all of you observed, I'm involved at the moment in a jury trial, and I wanted to make maximum use of the jury's time, even at your expense.

We have a hearing scheduled in the case of *Adams and others against Florida Power Corporation*, et cetera, No. 95-123-Civil-Ocala, to consider the motion to dissolve the class as well as, I believe, all other pending motions. Let's start at least with that motion, which I believe is yours, Mr. Sapp. What is your position with respect to it?

MR. SAPP: Your Honor, there has not been a motion to decertify filed.

THE COURT: Pardon?

MR. SAPP: There has been no motion to decertify the class.

THE COURT: To decertify? I was misinformed. I thought we had a –

MR. SAPP: No, sir, there has not been. We anticipate at the appropriate time filing such a motion, but [3] there is not one pending at the current time.

THE COURT: Well, I obviously haven't had a chance to review this file in preparation for this hearing in the detail that I should, thanks to the pending case. But what matter is there before the Court then that requires consideration this afternoon?

MR. SCOTT: Your Honor, I think that we're here basically for a status conference, to find out where the case is. I think that what we need to take up with the Court today is to set a discovery deadline so that we can get this case moving.

MS. REYNOLDS: There are as well, Your Honor, a number of motions that are pending. There's a motion as to the second amended complaint to dismiss forward progress. I believe there's a plaintiffs' motion for summary judgment on the counterclaim. Defendant's motion for summary judgment on portions of the counterclaim as well. And there's a defendant's motion for summary judgment as to the time-barred claims of four of the plaintiffs in the case.

There are as well – I guess there are three as well uncontested motions that have not been ruled upon.

THE COURT: Well, it's obvious I need to give this case greater attention then.

Mr. Scott, how many plaintiffs have opted in to this case at the present time? Have you named them all in your [4] most recent amended complaint?

MR. SCOTT: We have, Your Honor.

THE COURT: And how many are there?

MR. SCOTT: Your Honor, there are currently 56 joined plaintiffs and there are 61 opt-ins, a total of 117.

THE COURT: 56 and 61?

MR. SCOTT: Yes, sir.

THE COURT: And what's the status of the running of the statute of limitations with respect to any other class members who have not opted in? Are you able to say?

MS. REYNOLDS: I guess the period for opting in closed in May of – it would be my guess that the statute of limitations has long since run.

THE COURT: Well, in other words, we have before us in these 117 plaintiffs the entire universe of plaintiffs who could now have a justiciable claim, at least within reasonable legal anticipation, I take it.

MS. REYNOLDS: Yes, Your Honor.

MR. SCOTT: Your Honor, out of this particular group of individuals, there were 556. I think 380-something actually were over the age of 40. And notice was sent to all of them.

The only ones who have opted in are the ones that are in it to date. I don't know any other way that these people could opt in to this case at this point, because they were [5] given a choice.

THE COURT: Well, I don't know that they would be required to opt in. We're talking about a Fair Labor Standard-type class, not a Rule 23 class. Right?

MS. REYNOLDS: They'd be required to opt in.

THE COURT: So as I recall a prior discussion we had, the statute of limitations would figure into the desirability of litigating the case as a class action more so than would otherwise be true, which is why I asked that question. I don't want to get started litigating a class of 117 people if it's not going to have a final preclusive effect and I have to do it all over again at some future date.

MR. SCOTT: Your Honor, I can tell you that from my best overview of the people that are involved in this, the ones that did not opt in would not be able to now get in, because they did not file with the EEOC. And I don't know how they could possibly do it. But I mean, I –

THE COURT: In other words, they're barred by limitations.

MR. SCOTT: Yes.

THE COURT: And we're dealing, as far as you're concerned, Mr. Scott, with the entire universe of those that would have a justiciable claim or viable claim remaining.

MR. SCOTT: Yes, sir. Under this particular program of reduction in force at Florida Power. There may be others [6] I don't know about.

THE COURT: Yes. I understand that. All right. Ms. Reynolds?

MS. REYNOLDS: Yes, sir.

THE COURT: What are the other motions you say that require attention now? There's a motion for summary judgment.

MS. REYNOLDS: Yes, sir. There's a motion to dismiss forward progress of the defendant in this case. There is a motion filed by the plaintiffs for summary judgment on the ADEA portion of the counterclaim. There is a defendant's motion for summary judgment basically as to the remaining elements on the counterclaim.

The defendant as well filed a motion for summary judgment as to time-barred claims of four specific plaintiffs. And then there are three uncontested motions that are simply pending. Plaintiffs have a motion to severe [sic] one of the plaintiffs who is still employed, Kermit Lassiter. Plaintiff has a notice of voluntary dismissal of Garland Shifflet which was not opposed. And then there is the parties' joint motion to appoint a Magistrate for purpose of handling discovery issues in the case.

THE COURT: I don't understand the last motion. Isn't Magistrate Judge Snyder assigned to this –

MS. REYNOLDS: Yes, Your Honor.

[7] THE COURT: – action? What other order do I need to make to empower Judge Snyder to resolve discovery disputes?

MS. REYNOLDS: I think that Judge Snyder is empowered to deal with discovery disputes at the present time, Your Honor.

THE COURT: All right. Well, the uncontested motions, of course, will be granted. I'll have to reserve ruling until I can – when did these motions for summary judgment become ripe? When were the briefs all filed?

MR. SCOTT: Your Honor, they're probably more than a year old.

THE COURT: Well, this case has been neglected. And I apologize for that. It's just taken us too long to – when was it that your settlement negotiations broke down? Last summer?

MR. SCOTT: At least – it's been over a year, I know.

THE COURT: All right. Well, what has been the progress of the discovery then in the last year?

MR. SCOTT: Your Honor, there has been mostly requests for production, interrogatories, several sets that have gone back and forth between the parties. We have exchanged a lot of documents. There's a lot that are in dispute. We're going to have to have the Court resolve the issue about getting certain documents.

[8] There's not been any depositions taken. But we do have some beginning the end of June. That is probably the biggest thing that we need to do, is take depositions.

I've discussed with Ms. Reynolds and Mr. Sapp before we came into the hearing that my proposal to the Court would be to set a discovery cutoff at the end of this year. Because that way it will force us – in other words, it puts the burden on us to get this thing done and to get – there's probably going to be far in excess of a hundred depositions that are going to have to be done because of the number of plaintiffs involved, if nothing else.

I think the plaintiffs are looking at probably somewhere around forty depositions. I'm assuming the defendants are going to want to depose each plaintiff that has not been deposed. Now, seventeen have. They've taken seventeen plaintiffs. But the rest they still need to take. So they've got a hundred right there.

THE COURT: Well, let's look forward at the moment to the trial of this case. Nobody is seeking to decertify the class, contrary to my impression.

MS. REYNOLDS: No, Your Honor. Let me lay that out for you a little bit better.

There was a motion filed to certify this class early on. We then agreed amongst ourselves to conditionally certify the class.

[9] THE COURT: I said "decertify."

MS. REYNOLDS: Right. To send out the class a notice, and then we filed a motion to be heard at a later time after the close of discovery, to refile a motion to decertify at that time, which would be a more appropriate time for determining that issue, to rebrief it and to be heard at that time. And I believe that motion was granted.

MR. SCOTT: It has not been filed though.

MS. REYNOLDS: Correct. I mean, to move it or postpone or place in abatement that issue until the close of discovery, at which time the defendants probably will raise the issue of decertification.

THE COURT: Well, all right. We can address that point if we're going to – it seems to me by that time it's going to be moot. Because we're going to have a hundred or 117 plaintiffs who have viable claims against the defendant. Whether it's a Fair Labor Standards Act class or not, it seems to me, has little or no significance at that point. You still have a hundred or 117 claims, whatever it is, that will have to be litigated. And the question is to what extent should they be, if not treated as a class, consolidated for purposes of trial. The issues would essentially be the same.

Where are the common issues in the cases that can be consolidated for trial and where are the individual issues [10] that must somehow or other be resolved seriatim or individually? It seems to me that at that point the class action question is just essentially an academic one. Wouldn't it be?

MS. REYNOLDS: No, Your Honor. If a class is decertified, then the class members who are not named in the complaints are no longer a part of the action. They can then take action on their own to try and initiate another piece of litigation or preserve their rights. But they would no longer be in this case.

THE COURT: Well, I'm not so sure about that under the Labor Act, and especially if we have pursued it

through discovery, Ms. Reynolds. They may or may not have viable individual claims, but they're still plaintiffs before the Court. They would simply be litigating individually, if I decertify the class. But then I would immediately confront the question whether they ought to be consolidated.

MS. REYNOLDS: They may or may not individually litigate. They would have to, of course, apply for leave through the Court, and they would have to find the plaintiffs that they could piggyback onto, whether or not there's an alternative there. And then it's upon them – it's their burden if they want to retain some sort of case or pursue their right to do so.

THE COURT: Well, I agree they would have to [11] affirmatively litigate the case. But assuming that – these 61 plaintiffs at least indicated a desire to do so. It seems to me the question of whether it's a class has essentially been rendered moot. But there's no need to decide it now. It's not before me. I'll worry about that later on.

But the point is, either way we're going to have to confront the question sooner or later as to what extent there are common issues that can be tried jointly, and to what extent there are individual issues that are going to have to be tried individually. And the decisions that we make procedurally, looking toward that kind of ultimate resolution at trial, it seems to me would drive, to a large extent, the decisions that are made on the procedures.

MR. SCOTT: Your Honor, in this case there was another plaintiff by the name of Akin who had a ninety-day letter from the EEOC. And when he received that, we

filed a separate complaint naming all 117 plaintiffs. That case is pending also. *Akin versus Florida Power Corporation*. We also filed a motion to consolidate that case with this case. And I can tell you that the 61 people who opted in have every intention of going forward, whether it's as a joint plaintiff or as part of a class.

And to be honest with you, it doesn't make any difference to the plaintiffs whether it's a class or 117 joined plaintiffs. That doesn't really matter.

[12] THE COURT: Well, I don't think it makes any difference to anybody anymore for the reasons I just stated. I mean, you get to the same situation sooner or later either way in terms of the disposition of these cases. They're either carved up and treated as 117 cases or they're treated as a class or they're consolidated. What difference would it make, Ms. Reynolds?

MS. REYNOLDS: It makes a big difference, Your Honor, in terms of prejudice to the defendant. I mean, if this case is decertified, as most ADEA cases are following discovery on the issues, it does put the 61 plaintiffs to some burden of taking some affirmative action in order to preserve their rights. And plaintiffs –

THE COURT: Beyond what they've already done?

MS. REYNOLDS: Yes, Your Honor.

THE COURT: Such as what?

MS. REYNOLDS: Such as either filing an interlocutory appeal or at some point trying to either move to get into another case or attempting, if they can, to file on their own.

MR. SCOTT: Which they've already done.

MS. REYNOLDS: Right. We have, unfortunately, two pieces of identical litigation in this same Court on different presumably discovery tracks from the *Akin* case.

THE COURT: Well, but the point is they've already [13] filed. Haven't they?

MS. REYNOLDS: Well – and that – they have filed. They have filed in the *Akin* case, and they filed basically an identical action. Seventeen plaintiffs are not in the *Akin* case.

THE COURT: Those are the original plaintiffs in this case.

MS. REYNOLDS: Correct. The remaining plaintiffs have filed in the *Akin* case. Plaintiffs in the *Akin* case who were opt-in plaintiffs, however, had already filed consents to be joined and to be bound in this action in the *Adams* case. So they have, in essence, taken an inconsistent position.

THE COURT: I'm back to where I am, it seems to me. We come to the same result as a practical if not a legal matter, regardless of whether it's a class or individual action. Because I am certainly going – if I'm confronted with 117 lawsuits, having common elements, I'm going to consolidate them to the maximum extent possible in order to try and dispose of all of the common issues at one time, and then treat the individual issues individually. And you get to the same result if it's a class in the same way.

It seems to me you have to take that into account in deciding what is an appropriate discovery track and discovery mechanism in the case.

[14] Is it possible from the plaintiffs' point of view to try the liability issues of all of these plaintiffs in common, Mr. Scott?

MR. SCOTT: Yes, sir, it is. We can do that.

THE COURT: What does the defendant say to that?

MS. REYNOLDS: No, sir. It would – there is no way to try them commonly. They're involved with numerous different decision-makers. In the group of plaintiffs that we have alone, there were at least three different programs or processes that affected them. There was redeployment; there was career transition 1; there was career transition 2. Some of the plaintiffs were terminated for cause. Some of them left voluntarily, even though there was still a job for them.

I mean, there are a whole host of reasons and independent defenses that the defendant would be precluded from bringing up were this tried as a class action, assuming liability is tried together. In addition to the fact of numerosity, which makes it difficult, we think, for a jury to understand the different aspects and different elements that apply to the intent of the decision-maker in an ADEA case.

This is not just damages. This goes to liability and the different programs and processes that affected these individuals and different defenses that would arise as to virtually each and every one of them.

[15] THE COURT: Well, so what do you envision? 117 separate trials?

MS. REYNOLDS: No, Your Honor. That's certainly a possibility, but I think that there probably are some that have some commonality.

THE COURT: Well, how are those to be identified?

MS. REYNOLDS: They'd be identified at the conclusion of discovery.

THE COURT: No. I think – I think we shouldn't have to wait until the end of discovery to do that, especially if there's contemplation of full discovery of all 117 plaintiffs. We can stage this case and begin to try some, discover and try common issues while discovery of individual issues is going on individually. If we're going to try 117 cases, you're going to have to find 117 lawyers, because I'm going to get some judges in here from elsewhere and we're going to start trying them in groups of ten or twelve at a time.

That's why we need to start thinking about the extent to which we can conduct a common trial or trials in this case and let that then drive the decisions that need to be made with respect to the taking of discovery and not the other way around, in my view.

MS. REYNOLDS: I think because the decision-makers were so varied in this case, it would be difficult to have [16] any common trial. It may be possible to break off segments of employees whose fate, as it were, were made by the same decision-maker or decision-making unit and try those, consolidate those plaintiffs.

THE COURT: Well, I have before me an amended case management report that was filed as document No. 165 in this case in the middle of last August. Is that the latest case management report that you have submitted in the case?

MS. REYNOLDS: Yes, sir, it is.

MR. SCOTT: Yes. Your Honor, in that report we could not agree on the dates for cutting off discovery. We could not agree on trial time. I think the plaintiffs wanted a shorter time; the defendants wanted a longer time.

MS. REYNOLDS: I recall it being the other way around. But –

THE COURT: All right. I think the thing to do at the moment, counsel, is the following. I'm going to reserve ruling and now give prompt attention to all of these pending motions and resolve them as quickly as I can, without any further delay.

I think I will direct that you each file within fifteen days, if you cannot agree on a stipulated schedule of discovery from this point, your individual proposals with respect to the staging of discovery from this point on in the case. And I'm talking about all discovery. Merit discovery, [17] including not only liability but damages issues, with respect to all plaintiffs presently before the Court. Your proposals concerning discovery.

And also your proposals, if any, concerning the way in which these plaintiffs might be grouped and what common issues exist that might be tried together, if any, from the standpoint of liability issues as distinguished from damages issues, looking toward an expectation as

you prepare those proposals that the Court is going to be looking to every conceivable device or method available to it to consolidate or coordinate the trials that will be necessary to resolve these cases, especially as to liability, if not with respect to damages.

I will then take those proposals and make an order with respect to discovery, pretrial, and trial, at least tentatively, and perhaps some order with respect to the structure that should be given to this case.

So I suggest that you try and resolve those issues between yourselves or be fully realistic in your proposals. Because if you can't agree, I'm going to make an order. And once I make an order, I'm going to be very difficult to be persuaded that it ought to be modified or altered in some way. And we'll get these cases on track for a trial or trials.

I don't think there'd be any purpose to be served by [18] having argument with respect to any of these other pending motions that you've identified. As I say, I'll just simply take those under submission and get them decided.

Is there anything else you want to raise or discuss for the plaintiffs, Mr. Scott?

MR. SCOTT: Your Honor, I would ask the Court if you would consider in the briefs that have been filed – some of them are well over a year old. If the Court would consider allowing the parties to supplement those if we feel it necessary. A lot may have happened since they were filed. I know there's probably some other issues that have come up.

THE COURT: Well, I'm hesitant to do that, Mr. Scott. All that does is further postpone and delay this matter, and I'm anxious now – and the fault is mine. I'm not faulting counsel. But now that I have confronted my own neglect, I'm prepared to put it right. And I think I'll just take these motions under submission as they are. If there are changed circumstances after you've seen my decision, then you can file additional motions if you want.

MR. SCOTT: Thank you.

THE COURT: Now, what is the representations of these plaintiffs? Do you at least nominally now represent all of these plaintiffs, Mr. Scott?

MR. SCOTT: Your Honor, I represent all plaintiffs except two. There are two that I do not. Mickey Golden and [19] John Gallagher are the two that I do not represent. Mr. Golden is represented by an attorney from Tampa named Howard Shifty, and the other man – Mr. Gallagher represents himself pro se.

THE COURT: And those two plaintiffs, I take it, are opt-in plaintiffs who –

MR. SCOTT: No, sir. They're part of the first seventeen, Your Honor. They're joined plaintiffs. They're in. They've been deposed. There's been some discovery done with those individuals.

THE COURT: All right. Mr. Sapp or Ms. Reynolds, anything else you want to say?

MS. REYNOLDS: I just have one thing to raise, Your Honor, that makes some of these motions a little bit confusing.

For example, the motion to dismiss forward progress filed as to the Second Amended Complaint in this case. We are up to at the present time a Fifth Amended Complaint. And the Court in an order granted the plaintiffs leave to file a Fifth Amended Complaint to add the thirty-nine amendment plaintiffs only as named plaintiffs in this case. That complaint – I am not aware of it having been filed.

THE COURT: I thought we had a Fifth Amended Complaint.

MR. SCOTT: We do, Your Honor. That was filed – the [20] motion to amend was filed at the same time. If the Court wants me to file another one, I can. But it's like 300-and-something pages long.

MS. REYNOLDS: Well, the Court order indicated that there were some inconsistencies that he was getting – your motion was in part denied and in part granted. So there were changes that had to be made subject to a ten-day filing period.

I, frankly, have no objection with him filing one. I just need to know what, what we're playing off of.

MR. SCOTT: I don't – Your Honor, I don't know what else I can do. I mean, it's got all 117. I think the Magistrate entered an order granting the Fifth Amended Complaint which named all 117, and he left the opt-ins as they are, opt-ins.

So I don't know what it is I'm supposed to add or delete.

THE COURT: Well, what do you say to that then, Ms. Reynolds?

MS. REYNOLDS: It indicates in the order, Your Honor, that the complaint needed to be refiled and that certain things needed to be addressed. I think there was an indication in the order that –

THE COURT: Well, I don't understand what "indication" means. What does it say?

[21] MS. REYNOLDS: I'm trying to find it here for you. If you'd give me a minute, please, sir.

THE COURT: This is the Magistrate's order, I take it.

MS. REYNOLDS: Yes. Entered –

THE COURT: What's the docket number?

MS. REYNOLDS: 194, I believe, but I'm not – (Perusing document.) It was entered on the 21st of November of '97.

THE COURT: All right. That will help. And that's on the plaintiffs' motion for leave to file a Fifth Amended Complaint?

MS. REYNOLDS: A Fifth Amended Complaint, Your Honor. The sixty-one opt-in plaintiffs were not permitted as named plaintiffs. The Court order is that plaintiffs' motion is granted and denied in part, and they're granted leave of Court to file an amended complaint within ten days from the date of this order. And I guess this was the first part of November of '97. I didn't know whether I'd not been served with that or if they'd not filed one.

THE COURT: Well, all right. I'll have to examine that and see.

You submitted a proposed amended complaint with your motion for leave to amend, Mr. Scott?

MR. SCOTT: Correct.

[22] THE COURT: Well, I'll have to examine that as I take up these motions and direct such amendments to the pleadings as may be required. But I'm disinclined to order the filing of repetitious papers that have very little effect except to expand the volume and weight of the file.

MS. REYNOLDS: I believe there was some argument or some discussion by the plaintiffs concerning dismissing certain portions, ERISA portions or whatever, as well. And I don't know if that was a part of the order.

MR. SCOTT: No, Your Honor. I don't know anything about that.

THE COURT: All right. I'll take that into consideration.

Is there anything else we can profitably discuss then this afternoon about this case?

MS. REYNOLDS: About the *Adams* case, I don't know. You had also set the *Akin* case down, and there are motions pending in that case as well.

THE COURT: All right. Is there any reason why the two should not be consolidated?

MS. REYNOLDS: Yes, sir, there is.

THE COURT: What is it?

MS. REYNOLDS: Well, for one thing, there's a problem with inconsistent rulings. By permitting the *Akin*

case to be consolidated, you have in effect gone contrary, I guess, to [23] the Court's order of the 21st that we just talked about, which precludes the 61 opt-in plaintiffs from being added to this case as named plaintiffs. So that ab initio, we have inconsistent rulings that affect the *Adams* case.

THE COURT: Well, I'm not sure that I understand that, Ms. Reynolds. It may –

MS. REYNOLDS: It goes to the decertification issue as well, Your Honor, whereas – if the plaintiffs are not named at the time the case is decertified, they go to the four winds.

THE COURT: They do what?

MS. REYNOLDS: They have to take some action in order to get back into a pending lawsuit if there is one that they can piggy-back on to.

THE COURT: Well, but they've already done that, in effect, by filing the other action. So it brings us right back where we were.

MS. REYNOLDS: So we in effect have inconsistent rulings by consolidating cases.

THE COURT: Well, I don't see how it's inconsistent. The Magistrate Judge simply said they couldn't come into this case.

MS. REYNOLDS: As named plaintiffs.

THE COURT: So they file their own case. Right?

MS. REYNOLDS: As named plaintiffs, Your Honor. [24] Although, at the time the *Akin* case was filed,

that motion was pending, the motion to file the Fifth Amended Complaint.

THE COURT: Well, is there a motion to dismiss –

MS. REYNOLDS: Yes, Your Honor, there is.

THE COURT: – the other case?

MS. REYNOLDS: Yes, Your Honor, there is.

THE COURT: And the grounds are what?

MS. REYNOLDS: The grounds are that the first-to-file rule should apply. But, in essence, they filed a case that is virtually identical to the *Adams* case, and it involved the same claims, state claims, age claims, under both federal and state law. While there is no explicit ERISA claim, the allegations in *Akin* directly align with the allegations in the *Adams* case, that they were targeting old, infirm employees in order to reduce the medical costs.

And under Rule 12, the Court says, "Commonly held or founded cases can be dismissed where issues presented could be resolved in an earlier-filed action." And that is exactly what you have here. You have an earlier-filed action, that action being the *Adams* case.

Under that rule, irrespective of consolidation, if you – you can dismiss a case in order to preserve and conserve judicial resources and to preclude what would happen if that case were consolidated, which is inconsistent rulings.

[25] The reason that case was filed by the plaintiffs, at least it was espoused in their response to this motion,

was in order to prevent the running of the statute of limitations as to Akin and I believe Hayes, another plaintiff. That act was unnecessary, because all of the plaintiffs named in that case, all of whom are in the *Adams* case, either by virtue of the Third or Fourth or Fifth Amended Complaint, or because they have simply opted into the case – all of them have affirmatively acted to come into the *Adams* case. Because they have done that, the Courts both in *Grayson, Durant, Armstrong,* pretty consistently hold that they have not, that the statute of limitations has tolled as to them.

So there was no need to file the *Akin* case. It was simply a superfluous case to the case in *Adams.*

THE COURT: Well, except you reserve the right to argue for decertification of the class.

MS. REYNOLDS: I'm sorry?

THE COURT: You reserve the right to argue that there should be a decertification of the class. Isn't that an inconsistent position?

MS. REYNOLDS: Not –

THE COURT: To say that they can't file their own lawsuit but they can't be certified as a class?

MS. REYNOLDS: It goes to the issue of the distinction between, Your Honor, a named plaintiff and an [26] opt-in plaintiff. I think that there are different issues in decertification. It goes to whether or not they're similarly situated. And the fact that there's an *Akin* case – it's as if the plaintiff is getting two bites of the same apple. There's been an issue and a ruling made as to the status of the non-original plaintiffs. That is, that 61 of

those plaintiffs are opt-ins, do not become named parties in the action. So that those are the individuals who would be affected by the decertification, Your Honor.

There is a distinction between a named plaintiff and an opt-in plaintiff. A named plaintiff, for example – or at least I believe it's the *Grayson* case that indicates that you have to rely on the charge of a named plaintiff. You don't want to piggyback in –

THE COURT: Well, all right. But wouldn't – it seems to me, Ms. Reynolds, if, in fact, those opt-in plaintiffs, having been determined to have opt-in status only insofar as the *Adams* case is concerned, are still subject to the possibility that the class will be decertified.

That, in and of itself, would afford a good-faith basis, if they wish to do so, to file a separate action as named plaintiffs before the statute of limitations runs. Would it not?

MS. REYNOLDS: I disagree, Your Honor. In opting in to this case, they agreed to be bound by the decisions in the [27] *Adams* case. I think that they're in essence doing exactly contrary to what they've agreed to do, which is to become a party or an opt-in plaintiff in this case, after we have agreed to provide them with notice. These individuals wouldn't be named plaintiffs anywhere but for the fact that we agreed to facilitate and provide notice to individuals out in the general public.

By having them come in and that automatically making them named plaintiffs and giving them rights beyond their opt-in notice rights is almost as if we –

THE COURT: Well, I don't think it has that right. But it certainly can't foreclose their right to institute an independent action when their class status is still inchoate.

MS. REYNOLDS: I believe that it does, Your Honor. I believe that they're bound in the *Adams* case to the rulings in the *Adams* case until such time as those rulings kick them out of the *Adams* case.

THE COURT: And then what can they do?

MS. REYNOLDS: And then they can do whatever it says they can do under the *Armstrong* case, I believe it is. They can either append to a charge that they would be able to piggyback on to. They can attempt to, if they file a charge, to file an individual action. They can appeal.

But they are different in their status from named plaintiffs by virtue of the, in large part, by virtue of the [28] notice that goes out. I don't think any defendant would be anxious to agree to a notice that would then effectively be advertising class status as named parties for individuals in the general public.

THE COURT: I understand the point, and I will look at it. It may be that I don't fully grasp the considerations involved. But I find nothing in that argument that persuades me as I sit here. But neither do I decide it. I'll try to resolve all this at one time and get this case back on track, both of them, in fact.

Is there anything else?

MR. SCOTT: Nothing, Your Honor.

MR. CHARLTON: Nothing, Your Honor.

MS. REYNOLDS: No, sir, Your Honor.

THE COURT: All right. Thank you, counsel.

MR. CHARLTON: Thank you, Your Honor.

(And thus the proceeding concluded at 5:17 p.m.)

[29] **CERTIFICATE**

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

I hereby certify that to the best of my knowledge and belief the foregoing transcript is a true and correct transcription of my stenographic notes and electronic tape recording made at the time and place specified herein.

WITNESS my signature and official seal at Jacksonville, Duval County, Florida, this 28th day of August A.D., 1998.

/s/ Mildred W. Shealy
MILDRED W. SHEALY, R.P.R.,
Official Court Reporter

EXHIBIT K

[LOGO] **Florida Power**
CORPORATION

INTEROFFICE CORRESPONDENCE

WORK FORCE DIVERSITY	D2A	231-4130
OFFICE	MAC	TELEPHONE

SUBJECT: REDEPLOYABLE PROGRAM FILE:

TO: Joe Richardson DATE: October 25, 1993

Per our conversation today on the Redeployable Program, I have learned that decisions are being made and communications planned for the employees impacted prior to review by my department. This is not in accordance with the agreement we made when the program was approved. Any department desiring to place individuals into the Redeployable program should contact me in order to review the candidates and ensure none are poor performers. Once I have given approval and senior management concurs, we schedule the employees to be informed by the immediate supervisor and orientation with myself or Dean Montgomery. In some instances, this is not occurring.

Please remind the senior management team of the above in order to continue to have a well managed and positive program. If there are any issues or concerns, please call me.

/s/ Edna
Edna C. Jones

xc: G.M/ Rickus, Jr.
H. D. Montgomery

[LOGO] **Florida Power**
CORPORATION

INTEROFFICE CORRESPONDENCE

WORK FORCE DIVERSITY	D2A	231-4130
OFFICE	MAC	TELEPHONE

SUBJECT: REDEPLOYABLE PROGRAM FILE

TO: Joe Richardson DATE: November 3, 1993

Attached you will find the report for the month of September, 1993 on the Redeployables and poor performers. This report will be submitted to you by the 10th working day of the month. If you have any questions, please call me.

/s/ Edna
Edna C. Jones

xc: George M. Rickus, Jr.

[Joe – Does this meet your needs

/s/ [Illegible]

check total FPC #]

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

Work Force Diversity	D2A	231-5493
Office	MAC	Telephone

PERSONAL & CONFIDENTIAL

SUBJECT: Redeployment Process Recommendations

TO: George Rickus DATE: March 31, 1993

Attached is the Redeployment Process Presentation and recommendations as to how a third-party provided (outplacement firm) will support our efforts. As noted in the presentation, the majority of redeployable employees will participate in our in-house career transition workshops.

We recommend, as identified on pages 4 and 5, only senior management redeployable employees will be referred to an outplacement firm. Those firms providing initial responses to our requests fully understand these employees will be searching for job leads internally and externally simultaneously. Further, they will provide specific status reports on each client referred.

The internal process is well defined and to ensure the absolute partnership expectations with the third-party the following elements need to be clarified. It is recommended that Drake Beam Morin, Inc. and Right Associates have an opportunity to respond to the following questions. They both presented focused proposals and competitive pricing schedules.

1. Redeployable employees at a market value of $82,000 and above will be referred to a third-party. What pricing schedule will be offered for these referrals?

2. Redeployable employees referred directly to a third-party provider will continue to job search internally with Florida Power; and subsequently, may secure an internal position rather quickly. Accordingly, what kind of rebate will be guaranteed to Florida Power should a limited amount of counseling service be provided?

3. Relative to a contingency plan, we need assurance that the provider can respond within a two-day period to conduct workshops to handle any overload situations. Can they confirm this request?

4. What services (and fee arrangement) can be provided to develop external job leads locally and nationally to support those employees participating in Florida Power's inhouse sessions?

If this meets with your approval, I'll send the questions immediately to both vendors. Additionally, it might make sense to provide them a copy of our defined process for clarification and reactions.

/s/ Dean Montgomery
H. Dean Montgomery

REDEPLOYMENT PROCESS

PRESENTED BY
WORK FORCE DIVERSITY

MARCH 1993

MISSION STATEMENT

PROVIDE PLACEMENT COUNSELING TO REDEPLOYABLE EMPLOYEES TO ENHANCE THEIR MARKETABILITY IN SECURING A NEW POSITION WITHIN FLORIDA POWER CORPORATION OR EXTERNALLY WITH ANOTHER FIRM.

SUMMARY

This overview will address what career and job search counseling will be made available to redeployable employees. The emphasis is on placement and managing a positive outcome through the counseling process.

To support redeployable employees, Florida Power Corporation will offer career transition counseling for a period of up to one year.

At the senior manager level, career transition counseling will be offered by a third party provider. All other professional redeployable employees will receive career transition counseling through in-house job search workshops with individual follow up counseling.

Also designed into this process is a contingency plan whereby a third party provider will be available to conduct workshops for any overload situations.

REDEPLOYABLE RESOURCES – FINAL

- No poor performance or problem employees in redeployable group – deal with them now outside of this business process improvement.
- It is Line Management's responsibility to successfully manage their redeployable employees. Human Resources will provide assistance in retraining efforts and outplacement service as part of this partnership.
- Employee can be identified as redeployable by:
  - Position reduction due to business process improvement.
  - Position reduction at holding company.
  - Position reduction resulting from organizational realignment.
- Individual stays in "current" role until *new business process* is implemented.
- Redeployable employees *may* be offered reasonable retraining if necessary to quality for internal positions.
- Redeployable employees remain at current salary for up to one year or until one of the following occurs:
  - Accepts new job offer. If current salary greater than 120% of new job market value, salary will be reduced to the lower amount.
  - Job offer refused, employee released without remaining salary paid.
  - If voluntary termination, remainder of one year's salary paid.
  - As a result of *placement process* individual accepts *or* rejects external job offer.
  - Separation at one year after date declared redeployable.

- Non-exempt and exempt employees who are redeployable will be given consideration for all posted job openings prior to official posting using following process:
  - A redeployable individual has to initiate application for job opening.
  - Hiring supervisor and responsible Senior V.P. has to justify why redeployable applicant is not qualified to the present supervisor and supervisor's responsible Senior V.P.
  - if disagreement, goes to President for final review and decision.
- Redeployable employees remain in their department and in the department budget until "one year" event occurs as described earlier. They may be assigned other duties by their departmental management or reassigned to different duties outside their department prior to full-time reassignment to a new position. Unless assigned to duties elsewhere, redeployable employees should remain in their work area – though *not* in the new business process.
- Redeployable employees should not go through an assessment center process or formal assessment. However, if disagreement over qualifications exists, then a modified targeted selection process will be used.
- HR will do continuous adverse impact analyses and inform senior management of any issues as they arise.
  - Evaluate who is being declared redeployable.
  - Who gets job offers.
  - Who actually is released from Company.
- Bargaining unit employees whose positions are eliminated will not be covered by this process but will be treated consistent with our union contract.

NOTE: DO NOT SEND OUT ANY NOTIFICATIONS OR PUBLICATIONS OF THIS PROGRAM. IF REDEPLOYABLE EMPLOYEES IDENTIFIED, CONFIRM WITH SENIOR V.P. OF THAT AREA.

[REDEPLOYMENT PROCESS
Flow Chart Omitted In Printing]

REDEPLOYABLE EMPLOYEE STATUS DEFINITION

As employees are identified for the redeployment counseling process, they will be informed as to their referral status, and at that time, all process particulars will be explained to them by the appropriate Human Resources representative. (Edna Jones or Dean Montgomery will have primary responsibility to precisely inform the employee of all program elements and have the Redeployable Process form acknowledged and signed). Additionally, it is recommended that the employee's Supervisor be present at this meeting to generate complete understanding on everybody's part as to the established priority in securing another position (internally/externally) during the 12 month time frame.

Redeployable Employee will be identified as follows for referral purposes:

LEVEL	REFERRAL CRITERIA
(1) Management Employee	All employees with manager titles will be referred to the selected outplacement firm.
(2) Supervisory/ Exempt	These employees will participate in the in-house job counseling program.

(3) Professional — All other exempt and non-exempt employees. These employees will participate in the in-house counseling program.

any redeployable employee referred immediately to the outplacement firm will receive the same reference materials as in-house clients. Further, they will receive one-on-one counseling as it relates to key internal search techniques as well as performance feedback from all appropriate sources.

REDEPLOYMENT PROCESS PROCEDURES

- Employee is notified by his/her Supervisor that he/she is being referred to the Redeployment Process.

ACTIONS

- Supervisor alerts Edna Jones or Dean Montgomery to schedule meeting with redeployable employee (Edna Jones/Dean Montgomery will be responsible for ensuring a smooth transition and total acknowledgement of the process elements).
- Initial meeting conducted with redeployable employee (employee's Supervisor present) to describe the process and have employee sign the appropriate form.
- Counseling materials provided to participant and scheduling referral dates established for orientation and either in-house and/or external counseling session. (It is imperative these dates occur immediately)
- Human Resources Office process counselor alerted of employees within their service area

General Office Complex	– Edna Jones/Dean Montgomery

Suncoast Division	– Edna Jones/Dean Montgomery
Central/Northern Division	– Maggie Pointer
Eastern/Ridge/ Mid-Florida Division	– Dan Hosford

- Management Redeployable employee referred to outplacement firm.
- Human Resources manages a weekly strategy meeting to capture participant's progress or proper feedback to Senior Management regarding lack of progress. Outplacement firm provides the same information.
- Central file maintained at General Office Complex for case management reviews.

[REDEPLOYABLE EMPLOYEE CASE MANAGEMENT PERFORMANCE CHART Omitted In Printing]

EVENTS

(A)
- Initial meeting held (form signed)
- Introductory materials provided (work book, reference books)
- In-house 2-day workshop starts – ends

(B)
- New resume produced
- application via "Special" Opportunity bulletin starts

(C)
- Interviewing skills assessed
- Networking strategies developed

(D)
- Resume on street (internal/external)
- Internal Interviews conducted/evaluated
- Weekly planning/results sessions

(E)
- External interviews occurring
- Strong performance evaluation against process to predict success
- Documented weekly case reviews/coordinated with master file

(F)
- On-going case progress reviews and consultation

NOTE

This time-line chart depicts the critical milestone dates to measure performance and chart progress. In those situations where the redeployable employee appears to be falling behind, Human Resources will initiate action to alert both the employee and his/her supervisor.

IN-HOUSE REDEPLOYMENT
JOB SEARCH COUNSELING

- PROVIDED SERVICES
  - Job Search Counseling/Reference Center
  - Phone/Fax Support
  - Administrative Support
  - Reference Materials
- JOB SEARCH WORKSHOP (2-Day)
  - Career Development Session
  - Job Search Session
  - Individual Follow-up Session

IN-HOUSE REDEPLOYMENT
JOB SEARCH COUNSELING
(CONTINUED)

- KEY ELEMENTS OF JOB SEARCH SESSION
  - Orientation . . . "Enabling techniques"
  - Job Search Do's & Don'ts . . . "Quality performance starts with the fundamentals"
  - Career Development/Analysis
  - Resume Preparation . . . "Calling Card"
  - Interview Training . . . "A Re-look"
  - Marketing/Network Strategies
  - Recordkeeping
  - Individual Performance Measurement
  - Opportunity Bank of Job Leads

ASSISTANCE OFFERED TO IDENTIFY EXTERNAL
JOB OPPORTUNITIES

- Newspaper Search (local/national)
  - National Employment Weekly
- Periodicals
- Networking
  - Community Organizations
  - Utility Companies
  - Job Search Directories
- Job Service Office (disclaimers)
- Temporary Employment Agencies

- Search Firms (local/national)
- Resume input to computerized data bases

ACTION:

- Publish resume books to local/national companies
- "Networking" Introductions
- Job Development Center (identifying jobs locally and nationally)
  - Contract with third-party provider to support this element of the process.

VACANCY COMMUNICATION TO REDEPLOYABLE EMPLOYEES

- OBJECTIVE
  - Redeployable employees *will have first consideration* at all job vacancies as they develop
- METHODS
  - A weekly Opportunity Bulletin will be exclusively published for all redeployable employees to declare interest
  - The position will be held for 10 working days prior to being published on the regular Opportunity Bulletin (unless notified differently by management)
  - Supervisor will be responsible to stay alert to possible placements for their employees by working through the supervisor with vacancy.

    NOTE: Senior Management should know all the redeployable employees and appropriate employment consideration offered even outside the Opportunity Bulletin process.

REDEPLOYABLE CONTINGENCY PLAN

•SHOULD AN UNEXPECTED NUMBER OF PROFESSIONAL ASSOCIATES BE IDENTIFIED TO PARTICIPATE IN THE REDEPLOYABLE PROCESS, THE FOLLOWING HAS BEEN ARRANGED WITH AN OUTPLACEMENT FIRM TO ASSIST AND SUPPORT OUR NEEDS:

–Services provided immediately

–Conducted off-site

–Support our initiatives – both internal and external job search

–Monitor progress

PROCESS PERFORMANCE MEASUREMENT

•All redeployable employees are placed either internally or externally within the one year time frame.

•All redeployable employees feel that their search efforts were enabled through the placement counseling and the experience was positive for all concerned.

REDEPLOYMENT PROCESS FORM

- CONFIDENTIAL -

To: Edna C. Jones (D2A) From: _____

Employee: _____ Phone: ( )_-_____

Position Title: _____ Social Security Number: _____-_____-_____

Work Location: _____ Phone: ( )_-_____
Hire Date: _____ Salary: _____
(Monthly)

Redeployment Process Starts: _____

Redeployment Process Ends: _____

_____

The Redeployment Process has been explained to me and I fully understand my responsibilities in locating and securing another position within Florida Power Corporation or externally with another firm. I further understand there is a one year limit placed on this process.

_____/_____
Employee Signature Date

_____/_____
Human Resources Date
Representative

[LOGO] Florida
Power
CORPORATION
INTEROFFICE CORRESPONDENCE,

Human Resources	**A7A**	**231-4298**
OFFICE	**MAC**	**TELEPHONE**

SUBJECT: **Workforce Reductions**

TO: **Dr. J. B. Critchfield** DATE: April 3, 1995

FROM: P. K. Blizzard
/s/ PK Blizzard

You have requested an analysis of reductions in the workforce since July, 1993, when Florida Power Corporation started the first downsizing program. In addition to the three downsizing programs (Redeployment, Early Retirement, and Career Transition), you also have requested information on attrition and terminations. That information is attached. It is configured two ways: by type of employee and by program.

Please contact me if you have any questions.

PKB:mf

Attachment

WORKFORCE REDUCTIONS
7/1/93-3/17/95

REDUCTIONS: BY CATEGORY

	Number	Percentage
Management	196	18%
Exempt Employees (non-management)	355	33%
Non-Exempt Employees	347	32%
Bargaining Unit Employees	181	17%
Total Reductions Since 7/1/93	1,079	

REDUCTIONS: BY PROGRAM

Non-Union:	Number	Percentage
Redeployment Process (7/1/93-6/1/94)[1]		
Exempt Employees	116	46%
Non-Exempt Employees	111	44%
Building Management (hourly)	25	10%
Total	252	
Early Retirement (2/94)[1]		
Exempt Employees	148	83%
Non-Exempt Employees	30	17%
Total	178	
Career Transition (6/2/94-3/17/95)[1]		
Exempt Employees	156	70%
Non-Exempt Employees	68	30%
Total	224	

[1] Not available to union employees.

Attrition and Termination[2]	244
Total Reductions: Non-Union Employees	898
Bargaining Unit:	
Layoffs	58
Attrition	95
Termination	28
Total Bargaining Unit Employees	181
Total Employees	1,079

WORKFORCE REDUCTIONS
7/1/93-[2/28/95]

REDUCTIONS: BY CATEGORY

	Number	Percentage
Management	196	18%
Exempt Employees (non-management)	355	33%
Non-Exempt Employees	347	32%
Bargaining Unit Employees	181	17%
Total Reductions Since 7/1/93	1,079	

[2] Attrition includes death, termination, disabilities, and retirement.

REDUCTIONS: BY PROGRAM

Non-Union:	Number	Percentage
Redeployment Process (7/1/93-6/1/94)[1]		
Exempt Employees	116	46%
Non-Exempt Employees	111	44%
Building Management (hourly)	25	10%
Total	252	
Early Retirement (2/94)[1]		
Exempt Employees	148	83%
Non-Exempt Employees	30	17%
Total	178	
Career Transition (6/2/94~~-3/17/95~~ [2/28/96])[1]		
Exempt Employees	~~156~~ [268]	~~70%~~ [71%]
Non-Exempt Employees	~~68~~ [107]	~~30%~~ [29%]
Total	~~224~~ [375]	
Attrition and Termination[2]	244	
Total Reductions: Non-Union Employees	898	
Bargaining Unit:		
Layoffs	58	
Attrition	95	
Termination	28	
Total Bargaining Unit Employees	181	
Total Employees	1,079	

[1] Not available to union employees.

[2] Attrition includes death, termination, disabilities, and retirement.

EXHIBIT L

SUPERVISOR'S SUMMARY GUIDELINES FOR DOWNSIZING

The explanations provided below define the **categories** for downsizing, the **criteria** for each of these categories, benefits provided to each category of employees, and other related pieces of information to be used by supervisors in implementing this program.

These "Guidelines" are applicable to exempt and non-exempt employees. Bargaining unit employees **are not included**. The "Memorandum of Agreement" provisions will be applied to bargaining unit employees.

POOR PERFORMERS

Definition: The employee is not meeting present expectations of the job.

Documentation: There should be past performance review(s) indicating performance issues as well as past performance memos outlining expectations of the supervisor and a timetable to reach an acceptable level of performance. This level of performance was not met during the required time frame.

These employees are eligible for the following:

1. Payment for wages earned but unpaid.
2. Payment for unused vacation.
3. Payment for unused regular holidays occurring **prior to** their termination date.

4. May be eligible for unemployment compensation. Employees should refer to the Governmental Section of their telephone directory to determine the location and telephone number of their local Unemployment Compensation Claims Office. The employee will be provided with a brochure from the Division of Unemployment Compensation.
5. Continuation of medical and/or dental coverage under COBRA. Human Resources will contact CobraServ, who is the Plan Administrator, and CobraServ will send the terminated employee a letter explaining options for continuing medical and/or dental coverage. The employee has a deadline to respond. The employee pays the full premium (the Company and employee portion) plus a 2% administrative fee.
6. The Employee Assistance Program (HELP) will be made available for six months after termination.
7. Employees with a Savings Plan account balance will receive and complete an election form to direct how they wish to receive the final distribution of their Savings Plan account. Employees with an account balance of at least $3,500 may decide **when they wish to receive** their final distribution. They may elect to leave their funds in the Plan until the month following their 65th birthday, or they may elect to receive a final distribution in any month after their determination.

These employees are <u>not eligible</u> for the following:

1. Career Transition compensation.
2. Payment for unused personal floating holidays.
3. Career Transition Workshops.
4. Two hours of financial counseling.

General Information

1. Supervisors should refer to **Attachment 1** for a checklist of things to do and items to collect from employees leaving the Company as well as for a Listing of Contact People.

EMPLOYEES WITH AVERAGE OR BETTER PERFORMANCE BUT THE JOB IS ABOLISHED

Definition: **The employee is meeting or exceeding the expectations of the position, but the position needs to be abolished.**

Documentation: Past evaluations should reflect average or better performance.

These employees are <u>eligible</u> for the following:

1. Payment for wages earned but unpaid.
2. Payment for unused vacation.
3. Payment for unused regular holidays occurring **prior to** their termination date.
4. **Career Transition compensation** is calculated as **one week of pay for each six months of service**. Adjusted Service Date, which is the date used to determine vacation, will be used for this calculation. Service over a six month increment should be rounded up to the nearest six months using the adjusted service date. Examples of calculations are as follows:

Service	Calculation
20 years	20 years x 2=40 weeks
20 years, 5 months	20 years x 2=40 + 5 months=41 weeks
20 years, 7 months	20 years x 2=40 + 7 months=42 weeks

5. May be eligible for unemployment compensation. Employees should refer to the Governmental Section of their telephone directory to determine the location and telephone number of their local Unemployment Compensation Claims Office. The employee will be provided with a brochure from the Division of Unemployment Compensation.

6. Career Transition Workshops will be made available by Human Resources. These two-day workshops will cover resume writing, networking, interviewing, and will provide a transition for the employee from the company to the workplace. The employee will be responsible for contacting the appropriate Human Resources Regional Office for scheduling, if they wish to attend.

7. Two hours of financial counseling will be made available. An outside contract is in place. The employee will be responsible for contacting the financial counselor directly for scheduling, if they wish to attend.

8. Employees may be considered for re-employment when Florida Power positions are recruited externally after the period of time has expired for which they were compensated.

9. Continuation of medical and/or dental coverage under COBRA. Human Resources will contact CobraServ, who is the Plan Administrator, and CobraServ will send the terminated employee a letter explaining options for continuing medical

and/or dental coverage. the employee has a deadline to respond. The employee pays the full premium (the Company and employee portion) plus a 2% administrative fee.

10. The Employee Assistance Program (HELP) will be made available for six months after termination.

11. Employees with a Savings Plan account balance will receive and complete an election form to direct how they wish to receive the final distribution of their Savings Plan account. Employees with an account balance of at least $3,500 may decide **when they wish to receive** their final distribution. They may elect to leave their funds within the Plan until the months following their 65th birthday, or they may elect to receive a final distribution in any month after their termination.

These employees are <u>not eligible</u> for the following:

1. Payment for unused personal floating holidays.

General Information

1. Supervisors should refer to **Attachment 1** for a checklist of things to do and items to collect from employees leaving the Company as well as for a Listing of Contact People.

<u>EMPLOYEE WITH "AVERAGE" EVALUATIONS; HOWEVER, AN EXCELLENT EMPLOYEE'S JOB IS BEING ELIMINATED AND YOU WANT TO REPLACE THE AVERAGE EMPLOYEE WITH THE EXCELLENT EMPLOYEE</u>

Documentation:

1. Do an objective evaluation of the employees within the department.

2. Determine the positions to be filled and the competencies required. Select the employees to fill the positions based on your evaluation performed in #1. If you have vacancies, communicate with other managers who may be displacing excellent employees who could fill your vacancies.

3. If the employee is not placed and the position is not abolished, the compensation, guidelines, and general information are the same as in the example above for **EMPLOYEES WITH AVERAGE OR BETTER PERFORMANCE, BUT THE JOB IS ABOLISHED** category.

CAREER TRANSITION FOR EMPLOYEE WHO IS ELIGIBLE FOR RETIREMENT

Definition: To meet minimum early retirement eligibility requirements, the employee must be at least 55 years old and have at least 15 years of Continuous Service, as defined in the plan document for the Employees' Retirement Plan of Florida Progress Corporation (Retirement Plan). To meet this age requirement, employees must be actively employed through the end of the month they reach age 55.

These employees are eligible for the following:

1. Payment for wages earned but unpaid.
2. Payment for unused vacation.
3. Payment for unused regular holidays occurring prior to their termination date.
4. Post-retirement medical coverage for the employee and their spouse and life insurance coverage.

Employees will be provided details about the program and related costs during their retirement counseling.

5. Continuation of dental coverage under COBRA. Human Resources will contact CobraServ, who is the Plan Administrator, and CobraServ will send the terminated employee a letter explaining the options for continuing dental coverage. The employee has a deadline to respond. The employee pays the full contribution amount plus a 2% administrative fee.

6. A monthly pension benefit payable from the Retirement Plan based upon the payment option elected by the employee.

7. **Career Transition compensation** is calculated as **one week of pay for each six months of service**. Adjusted Service Date, which is the date used to determine vacation, will be used for this calculation. Service over a six month increment should be rounded up to the nearest six months using the adjusted service date. Examples of calculations are as follows:

Service	Calculation
20 years	20 years x 2=40 weeks
20 years, 5 months	20 years x 2=40 + 5 months=41 weeks
20 years, 7 months	20 years x 2=40 + 7 months=42 weeks

8. Two hours of financial counseling will be made available. An outside contract is in place. The employee will be responsible for contacting the financial counselor directly for scheduling, if they wish to attend.

9. The Employee Assistance Program (HELP) is available to the employee as long as they elect retiree medical.

10. Employees' retirement counseling will cover all aspects regarding the timing and payment options for receiving their final Savings Plan distribution. They may elect to leave their funds in the Plan until the month following their 65th birthday, or they may elect to receive a final distribution in any month after their retirement.

These employees are <u>not eligible</u> for the following:

1. Payment for unused personal floating holidays.

General Information

1. Supervisors should refer to **Attachment 1** for a checklist of things to do and items to collect from employees leaving the Company as well as for a Listing of Contact People.

CAREER TRANSITION FOR EMPLOYEE WHO IS ALMOST ELIGIBLE FOR RETIREMENT

Definition: If the employee would reach retirement eligibility within the number of weeks derived in the calculation for Career Transition compensation, you may maintain the employee on the payroll as an active employee for the required time until retirement.

If it does not take all the weeks derived in the Career Transition compensation calculation to reach retirement eligibility, the excess weeks will be paid to the employee in a lump sum when they retire. The employee's supervisor and senior officer will determine if the employee remains at

work or is to remain at home, available for consultation if needed.

If the employee would not reach retirement eligibility within the number of weeks used in the Career Transition compensation calculation, the employee should be released using one of the options above. **If this is the case, eligibility for programs follows the category under which the employee is released, not what is shown below.**

These employees are <u>eligible</u> for the following:

1. Payment for wages earned but unpaid.
2. Payment for unused vacation.
3. Payment for unused regular holidays occurring **prior to** their termination date.
4. Post-retirement medical coverage for the employee and their spouse and life insurance coverage. Employees will be provided details about the program and related costs during their retirement counseling.
5. Continuation of dental coverage under COBRA. Human Resources will contact CobraServ, who is the Plan Administrator, and CobraServ will send the terminated employee a letter explaining the options for continuing dental coverage. The employee has a deadline to respond. The employee pays the full contribution amount plus a 2% administrative fee.
6. A monthly pension benefit payable from the Retirement Plan based upon the payment option elected by the employee.
7. **Career Transition compensation** is calculated as **one week of pay for each six months of service.**

Adjusted Service Date, which is the date used to determine vacation, will be used for this calculation. Service over a six month increment should be rounded up to the nearest six months using the adjusted service date. Examples of calculations are as follows:

Service	Calculation
20 years	20 years x 2=40 weeks
20 years, 5 months	20 years x 2=40 + 5 months=41 weeks
20 years, 7 months	20 years x 2=40 + 7 months=42 weeks

8. Two hours of financial counseling will be made available. An outside contract is in place. The employee will be responsible for contacting the financial counselor directly for scheduling, if they wish to attend.

9. The Employee Assistance Program (HELP) is available to the employee as long as they elect retiree medical coverage.

10. Employees' retirement counseling will cover all aspects regarding the timing and payment options for receiving their final Savings Plan distribution. They may elect to leave their funds in the Plan until the month following their 65th birthday, or they may elect to receive a final distribution in any month after their retirement.

These employees are <u>not eligible</u> for the following:

1. Payment for unused personal floating holidays.

General Information

1. Supervisors should refer to **Attachment 1** for a checklist of things to do and items to collect from employees leaving the Company as well as for a Listing of Contact People.

SUPERVISOR'S SUMMARY
GUIDELINES FOR DOWNSIZING

ATTACHMENT 1

1. **A. The supervisor should obtain the following items from all employees leaving the Company:**

   - identification badge.
   - credit cards.
   - keys.
   - company equipment.
   - company manuals (**except for the "You and Your Company: A Strategic Partnership manual, which the employee should keep**), and
   - any working fund advances.

   B. The supervisor should verify the employee's home address and home phone number and update the profile with the corrected information.

   C. The supervisor should cancel the employee's computer access by contacting Data Security at 231-4301.

D. The supervisor should notify Payroll of the termination at 231-5376 and process the termination through the profile immediately. If a position is to be abolished, a Position Control Request form must be completed and accompany the profile (see attached example). **If the employee is eligible for career transition compensation, please provide a completed copy of Attachment 2 to both the Payroll and Workforce Management Departments.**

E. Security should be notified if the situation warrants (ie. the employee threatens supervisor or other employees).

2. Listing of Contact People

All questions regarding the following benefit plans:

Retirement Plan
Cheryl Surbaugh 231-4257 or (813) 866-4257
Savings Plan
Mary Nevitt 231-4258 or (813) 866-4258

For scheduling or questions related to Career Transition Workshops and/or Financial Counseling:

Central Florida Region:
Darryl Rollins 222-4381 or (407) 646-8381
Dan Hosford 222-4387 or (407) 646-8387

North Florida Region:
Gail Tiffany 240-6232 or (904) 795-6725 Ext. 6232 (813) 866-5802

Suncoast Florida Region:
Mitchell Carter 220-5604 or (813) 562-5604

ATTACHMENT 2

CAREER TRANSITION NOTIFICATION

To: Phil Yee, Payroll Department Date:

Please be notified that the following employee is being terminated from the Company under one of the categories of employees which qualifies for Career Transition compensation.

Employee Name: _____

Employee Social Security Number: _____

Eligible for Early Retirement: Yes No

Termination Date: _____

Supervisor's Name: _____

Supervisor's Title: _____

_____
Supervisor's Signature

cc: Edna Jones, Workforce Management

[EXHIBIT M – 1994 & 1995 Career Transition By VP Chart Omitted In Printing]

[EXHIBIT N – 1995 Employee List Sorted By Date, Florida Power Corp. 12/21/95 Chart Omitted In Printing]

[EXHIBIT O – 1994 CT By Term Date Chart Omitted In Printing]

EXHIBIT P

(LOGO) Florida Power CORPORATION

INTEROFFICE CORRESPONDENCE

Human Resources (OFFICE) A7A (MAC) 231-4298 (TELEPHONE)

SUBJECT: Employee Numbers

TO: Edna Jones DATE: November 16, 1994

FROM: P. K. Blizzard

By 4 p.m. today, I need the following information:

For the three downsizing programs – redeployment, early retirement, career transition – how many exempt, non-exempt and bargaining unit employees left the company? This needs to be broken down into the three categories for each of the three programs. Also, what were the approximate dates of the three programs? This information is requested by Dr. Critchfield for the Board of Directors meeting tomorrow morning; therefore, I need to have it before 4 pm today. Here is what I have from various correspondence, but I need to have it verified and completed:

Redeployment: Oct. 93 to May 94 – 230 employees (no break out). 117 bargaining unit employees laid off but 64 were rehired as casual or temporary employees.

Early retirement: Feb. 94 – 178 regular employees (151 exempt, 27 non-exempt). No bargaining unit.

Career Transition: Oct. 94 and continuing through 1995 – 181 regular employees to date (132 exempt, 49 non-exempt). I have been told that 70 bargaining unit employees will go out, but have not verified this nor do I

know if it has happened. An additional 50 positions will go after Jan. 1.

[Handwritten Note]

Redeployment Process:	July 1, 1993 – June 1, 1994
Exempt	116
Non-Exempt	111
Hourly (Bldg Mgmt)	25
TOTAL:	252

Early Retirements:	February 1, 1994
Exempts	148
Non-Exempts	30
TOTAL:	178

Career Transition Process:	June 2, 1994 →
Exempts	132
Non-Exempts	49
TOTAL:	181

T50 people unknown

TOTAL: 611

Bargaining Unit 119 = 730

To: BTOWER:AMCGINTY PY
From: PBLIZZAR
Subject: Re: Touch Base on WF Reductio
Date: 10-17-94 Time: 7:35p

Originated by :AMCGINTY 10-14-94 11:23a
Replied by :PBLIZZAR 10-17-94 7:11p

I have finally received a revised list from Energy Supply. They did a good job in laying out the position reductions per department. First, their area 19 non-union employees terminated (3 are going to be paid past 10-94 because they are bridging until retirement) – Steam Plants (G. Marks): 4; Comb. Turbines (Stitt): 0; Fuels (Davis): 2 (but replaced with 1 new employee, therefore, net 1); Design and Construction (Major): 4; Energy Supply Service (Baldwin): 9 but replacing 1 so net 8; Business Development: 0.

24 bargaining unit positions (cannot be identified by RA until rolling is finished because they can roll across RAs)

In addition, in Energy Supply, there are 8 people in R.C. Bonner's group being transferred to Progress; 3 are being sent back to the Bargaining Unit; vacant positions are being abolished (4 were originally in 1995 budget but are now out); 1 non-union was transferred to CR3; 1 to Technical Services; and [illegible] to HR. Total: 62 positions gone with 61 originally in budget for 1995 but already taken out with the $10.5m decrease.

Energy Distribution: (I think you only need bargaining unit from now on, because the rest are on the sheets I gave you): Central Florida: 15, Suncoast: ?; Northern Fla: 30. You may want to call Janice Case to get the number of bargaining unit employees. I never got that number.

Energy Delivery: 2 b.u. (System Protection & Control Technicians). That's it by my numbers, but I cannot guarantee that they are correct until they do the Bargaining Unit layoffs. I'll try to get you an updated list as soon as it is ready. Call if I can help in any way.

EXHIBIT Q

To: PBLIZZAR
From: PWATERS
Subject: Career Transition Process
Date: 10-26-94 Time: 10:14a

Pat:

Here goes:

1. All employees on the list are in Company 01 – Florida Power Corporation.

2. We're sending you an Alpha listing and a listing by VP.

3. Males = 125, Females = 84

4. EEO Code #1 = White = 178
   EEO Code #2 = Black = 21
   EEO Code #3 = Hispanic = 7
   EEO Code #4 = Asian/Pacific Island = 3
   EEO Code #5 = Amer Ind/Alaskan Nat = 0
   EEO Code #99 = Unknown = 0

5. Exempt = 143
   Non-exempt = 66

6. Age 40 and over = 149 both together equal the 209 as of 10/25/04 ([illegible] 95 listings)
   Age 39 and under = 60

7. Retirees are identified by Retirement Date Colum .28 retirees

8. Dept. Numbers that are 3 digit have a zero at the beginning and this is not showing up on the list.

9. VP Code #0 = Keesler = 0
   VP Code #1 = Richardson = 0

VP Code #2 = Heinicka = 18
VP Code #3 = Beard = 18
VP Code #4 = Phillips = 112
VP Code #5 = Richardson = 17
VP Code #6 = Hancock = 19
VP Code #7 = Miller = 16
VP Code #8 = Henry = 8
VP Code #9 = Conner = 1

10. On verification of check amounts . . . .We verify against the original dataset that the comp amount for each individual is correct. We provide a copy of that verified dataset to Phil Yee, daily, which shows the date of the signed agreement forms. He then cuts a check for that comp amount, less taxes, and any other amounts owed to the company, if applicable.

11. Please keep in mind that HR has been removed from the list. With the exception of one person.

I think this covers it so far, let us know if you need further information.

Thanks.

Penny
Paige
Karen

[LOGO] Florida Power
CORPORATION

INTEROFFICE CORRESPONDENCE

Trust Planning	D2S	231-4028
OFFICE	MAC	TELEPHONE

SUBJECT: ANALYSIS OF RESTRUCTURING IMPACTS

DATE: June 30, 1994

TO: P. M. Beard, Jr.
J. R. Heinicka
D. L. Miller
J. H. Richardson
J. A. Hancock
P. C. Henry
M. H. Phillips

In an effort to assist Mr. Korpan in his upcoming meetings with analysts, the enclosed worksheets were prepared to analyze:

1. **The Impact of Workforce Reductions and Related Pretax Cost Savings** for employees who have left the company through attrition or other reasons for the time period from January 1993 to December 1996, whose positions have been abolished.

2. **The Impact of Additional Costs or (Savings) for Major Items.**

Copies of these schedules are attached for your information. We appreciate the assistance Human Resources received from each of your organizations to identify employees affected by these programs and the associated cost savings.

If you do have any questions, please give me (866-4028) or Cathy Bosi (866-4679) a call.

/s/ Karen Rezanka
Karen Rezanka

[Chart On Restructuring – Impacts And
Impact Of Additional Costs Or
(Savings) For Major Items Omitted In Printing]

To: BTOWER:THIPF
From: PBLIZZAR
Subject: Employee Numbers
Date: 11-15-94 Time: 5:26p

Originated by : PBLIZZAR 11-15-94 5:13p
Forwarded by : PBLIZZAR 11-15-94 5:26p (CHANGED)

Listed below are the numbers I have for the employees who have left in the various programs:

1. Redeployment: (Oct. 93 to May 94) 230 regular employees (Note: I do not have a list and Edna Jones, who has the only list, is out sick today; therefore, I cannot break it down into exempt and non-exempt.) 117 Bargaining unit employees were laid off, but 64 were rehired as casual or temporary employees.

2. Early retirement: (Jan-Feb., 1994) 178 regular employees (151 exempt employees, 27 non-exempt (hourly)). No bargaining unit employees.

3. Career Transition: (Oct, 1994 and continuing through 1995) 182 regular employees (116 exempt employees, 66 non-exempt (hourly)). Approximately 70

bargaining unit positions will be terminated, but because of seniority and "Rolling" into other positions, it is unknown at this time how many bodies will leave as a result of those 70 positions being eliminated. It is also anticipated that an additional 50 positions of regular employees will be eliminated after January 1.

TOTAL: 740 regular employees; 187 bargaining unit employees. In addition, a number of vacant positions also have been eliminated.

[LOGO] **Florida Power**
CORPORATION

INTEROFFICE CORRESPONDENCE

Legal Department	A5C	231-4164
OFFICE	MAC	TELEPHONE

SUBJECT: Early Out and Redeployment Tracking

TO: J. H. Richardson DATE: September 15, 1994

Attached for your review are two copies of the Position Complement Summary, the Summary-Early Out Tracking and the Early Out Tracking Detail Reports.

The Early Out Tracking is nearly completed. There remains only one outstanding position, Russell R. Schoetker, in Mr. Phillips' area. A copy of Mr. Phillips' report is attached for your information. I have not provided other departments' reports since they are completed.

With regard to the Redeployment List:

Mr. Beard – All positions have been abolished as required to date.

Mr. Hancock – All positions have been abolished as required to date.

Mr. Henry – All positions have been abolished – Completed (no copy attached).

Mr. Miller – All positions have been abolished as required to date.

Mr. Richardson – All positions have been abolished as required to date.

Mr. Phillips – Two positions are due to be abolished. (Davis and Paulsen). All other positions have been abolished as required to date.

If you have any changes or questions, please give me a call.

P. A. Brown

cc: E. Jones
P. Burmaster

POSITION COMPLEMENT SUMMARY AS OF 8/31/94

TOTAL	Regular	Authorized	Filled	Authorized/ Filled Variance
	12/31/93	5990	5755	235
	08/31/94	5443	5176	267
		547	579	
	Temporary			
	12/31/93	145	122	23
	08/31/94	135	114	21
		10	8	
	Part-Time			
	12/31/93	81	43	38
	08/31/94	64	47	17
		17	4	

POSITION COMPLEMENT SUMMARY AS OF 8/31/94

TOTAL	Regular	Authorized	Filled	Authorized/ Filled Variance
	12/31/93	5990	5755	235
	08/31/94	5443	5176	267
		547	579	

Temporary			
12/31/93	145	122	23
08/31/94	135	114	21
	10	8	
Part-Time			
12/31/93	81	43	38
08/31/94	64	47	17
	17	4	

[Redeployable Program Report As Of September 30, 1994 Omitted In Printing]

REDEPLOYABLE PROGRAM STATS

PARTICIPANTS:

Supervisors, Managers, Directors		16
Exempts		33
Non-Exempts		81
- Others	56	
- Bldg. Mgmt.	25	
TOTAL		130

Separated from the Program:

- Internal placement	3
- External placement	5

Redeployable Workshops:

- Internal	9
- External (special)	2

REDEPLOYABLE RESOURCES – FINAL – MAY 25, 1993

- No poor performance or problem employees in redeployable group – deal with them now outside of this business process improvement.
- It is Line Management's responsibility to successfully manage their redeployable employees. Human Resources will provide assistance in retraining efforts and outplacement service as part of this partnership.
- Employee can be identified as redeployable by:

  – Position reduction due to business process improvement.

  – Position reduction at holding company.

  – Position reduction resulting from organizational realignment.
- Individual stays in "current" role until *new business process* is implemented.
- Redeployable employees *may* be offered reasonable retraining if necessary to qualify for internal positions.
- Redeployable employees remain at current salary for up to six months or until one of the following occurs:

  – Accepts new job offer. If current salary greater than 120% of new job market value, salary will be reduced to the lower amount.

  – If voluntary termination, remainder of six month's salary paid.

  – As a result of placement process individual accepts internal job offer. If external job secured, remainder of six month salary will be paid.

  – Separation at six months after date declared redeployable.

- Non-exempt and exempt employees who are redeployable will be given consideration for all posted job openings prior to official posting using following process:

  – A redeployable individual has to initiate application for job opening.

  – Hiring supervisor and responsible Senior V.P. has to justify why redeployable applicant is not qualified *to* the present supervisor and supervisor's responsible Senior V.P.

  – If disagreement, goes to President for final review and decision.

- Redeployable employees remain in their department and in the department budget until "six months" event occurs as described earlier. They may be assigned other duties by their departmental management or reassigned to different duties outside their department prior to full-time reassignment to a new position. Where possible, unless assigned to duties elsewhere, redeployable employees should remain in their work area – though *not* in the new business process.

- Redeployable employees should not go through an assessment center process or formal assessment. However, if disagreement over qualifications exists, then a modified targeted selection process will be used.

- HR will do continuous adverse impact analyses and inform senior management of any issues as they arise.

  – Evaluate who is being declared redeployable.

  – Who gets job offers.

  – Who actually is released from Company.

- Bargaining unit employees whose positions are eliminated will not be covered by this process but will be treated consistent with our union contract.

NOTE: DO NOT SEND OUT ANY WRITTEN NOTIFICATIONS OR PUBLICATIONS OF THIS PROGRAM. DO DISCUSS WITH YOUR STAFF AND FEEL FREE TO ANSWER EMPLOYEE QUESTIONS. IF REDEPLOYABLE EMPLOYEES IDENTIFIED, CONFIRM WITH SENIOR V.P. OF THAT AREA.

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

WORK FORCE DIVERSITY	D2A	231-4130
OFFICE	MAC	TELEPHONE

SUBJECT: REDEPLOYABLE PROGRAM

TO: Joe Richardson

DATE: October 25, 1993

Per our conversation today on the Redeployable Program, I have learned that decisions are being made and communications planned for the employees impacted prior to review by my department. This is not in accordance with the agreement we made when the program was approved. Any department desiring to place individuals into the Redeployable program should contact me in order to review the candidates and ensure none are poor performers. Once I have given approval and senior management concurs, we schedule the employees to be

informed by the immediate supervisor and orientation with myself or Dean Montgomery. In some instances, this is not occurring.

Please remind the senior management team of the above in order to continue to have a well managed and positive program. If there are any issues or concerns, please call me.

/s/ Edna
Edna C. Jones

xc: G. M/ Rickus, Jr.
H. D. Montgomery

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

WORK FORCE DIVERSITY	D2A	231-4130
OFFICE	MAC	TELEPHONE

SUBJECT: REDEPLOYABLE REPORT

TO: Joe Richardson

DATE: November 3, 1993

Attached you will find the report for the month of September, 1993 on the Redeployables and poor performers. This report will be submitted to you by the **10th working day** of the month. If you have any questions, please call.

/s/ Edna
Edna C. Jones

xc: George M. Rickus, Jr.
[Joe –
Does this meet your needs?
/s/ [Illegible]
check total FPC #]

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

Work Force Diversity	A5C	231-4164
OFFICE	MAC	TELEPHONE

PERSONAL &
CONFIDENTIAL

SUBJECT: Redeployment Process Recommendations

TO: George Rickus

DATE: March 31, 1993

Attached is the Redeployment Process Presentation and recommendations as to how a third-party provider (outplacement firm) will support our efforts. As noted in the presentation, the majority of redeployable employees will participate in our in-house career transition workshops.

We recommend, as identified on pages 4 and 5, only senior management redeployable employees will be referred to an outplacement firm. Those firms providing initial responses to our requests fully understand these employees will be searching for job leads internally and

externally simultaneously. Further, they will provide specific status reports on each client referred.

The internal process is well defined and to ensure the absolute partnership expectations with the third-party, the following elements need to be clarified. It is recommended that Drake Beam Morin, Inc. and Right Associates have an opportunity to respond to the following questions. They both presented focused proposals and competitive pricing schedules. [ok]

[Timing to finalize]

1. Redeployable employees at a market value of $82,000 and above [How about others?] will be referred to a third-party. What pricing schedule will be offered for these referrals?

2. Redeployable employees referred directly to a third-party provider will continue to job search internally with Florida Power; and subsequently, may secure an internal position rather quickly. Accordingly, what kind of rebate will be guaranteed to Florida Power should a limited amount of counseling service be provided?

3. Relative to a contingency plan, we need assurance that the provider can respond within a two-day period to conduct workshops to handle any overload situations. Can they confirm this request?

4. What services (and fee arrangement) can be provided to develop external job leads locally and nationally to support those employees participating in Florida Power's in-house sessions?

If this meets with your approval, I'll send the questions immediately [ok] to both vendors. Additionally, it might

make sense to provide them a copy of our defined process for clarification and reactions.

/s/ Dean Montgomery
H. Dean Montgomery

[Redeployment Process, Presented By Work Force Diversity, March 1993 is Reproduced *supra* at Pages 225-235.]

REDEPLOYMENT PROCESS FORM

- CONFIDENTIAL -

To: Edna C. Jones (D2A) From: _____

Employee: _____ Phone: ( ) __-_____

Position Title: _____ Social Security Number: __-__-_____

Work Location: _____

Hire Date: _____ Phone: ( ) __-_____

Salary: _____ (Monthly)

Redeployment Process Starts: _____

Redeployment Process Ends: _____

The Redeployment Process has been explained to me and I fully understand my responsibilities in locating and

securing another position within Florida Power Corporation or externally with another firm. I further understand there is a one year limit placed on this process.

_____/___ _____/___
Employee Signature Date Human Resources Representative Date

EXHIBIT R

(LOGO) Florida Power CORPORATION

INTEROFFICE CORRESPONDENCE

Human Resources (OFFICE) A7A (MAC) 231-4298 (TELEPHONE)

SUBJECT: Career Transitioned Employees

TO: Senior Staff

DATE: August 3, 1995

FROM: P. K. Blizzard
/s/ PK Blizzard

Attached is a list for your information of all employees who have gone through the Career Transition process in 1994 and 1995. These employees are sorted by senior staff code as follows:

1994 Codes	1995 Codes
2 Kuzma	0 Keesler
3 Beard	1 Conner
4 Phillips	2 Heinicka
5 Richardson	3 Beard
6 Hancock	4 Richardson
7 Miller	5 Stanfield
8 Henry	6 Hancock
9 Conner	7 Miller
	8 Foley
	23 Warner
	A Toomey
	B Blizzard

I am providing these lists at your request so you know which employees in other departments have left the company. Please contact me if you should have any questions.

PKB:mf

Attachment

EXHIBIT S

(LOGO) Florida Power CORPORATION

INTEROFFICE CORRESPONDENCE

Human Resources (OFFICE) A7A (MAC) 231-4298 (TELEPHONE)

SUBJECT: Career Transition Employees

TO: R.Korpan
A.J.Keesler
Senior Officers

DATE: November 13, 1994

FROM: P.K.Blizzard
/s/ P.K.Blizzard

Several of you have requested a list of employees who have received notification of termination under the Career Transition program. Attached is the list, per Senior Officer. To date, 1831 employees have received the Career Transition package. An additional 20 employees are on the Master List to receive the package, and other employees will be notified as process analyses are completed. To prevent any accidental premature notification, I have blanked out the names of those employees with notification dates after this correspondence. It is possible that some of those employees already may have been notified; however, I erred on the side of caution.

I have made notations on the side of the lists as follows:

W	A release was signed, waiving the right of the employee to litigate the termination.
R	Retirement.
XW	The employee rescinded the release.
N/A	Not applicable; i.e., the employee was terminated prior to the package development.

The employees have up to 45 days from the date of receipt of the release to sign it. They then have 7 days to revoke their signed release. Those deadlines have not yet passed for any employee. As of November 8th, all but 26 employees had signed the release, and only one had revoked his signed release. Six of those not signing were retirees.

Please contact me if you have any questions or find any errors.

CONFIDENTIAL

	Employee Name	SSN	Term Date	Sen. VP	Dept. Num	Department Name	
W	BASSA, PHILIP	477-46-3730	10/28/94	3	2700	NUCLEAR OPERATIONS	E
	BRANNON, JOE N	286-32-8725	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	CHASTAIN, BARRY L	449-76-0056	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	CLARK, JAMES W	185-38-7963	10/28/94	3	2700	NUCLEAR OPERATIONS	N
	DELCASTILLO, MARTIN	264-35-8411	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	DORRIE, RICHARD S	145-36-9657	10/28/94	3	2700	NUCLEAR OPERATIONS	E
	GARG, NARENDRA K	153-50-4333	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	GREATREX, DIANE E	264-72-6535	10/28/94	3	2700	NUCLEAR OPERATIONS	N
	HEGDE, GOPAL N	383-66-7949	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	LAMM II, GERALD E	234-74-1158	10/28/94	3	2700	NUCLEAR OPERATIONS	E
	LOW, RICHARD H	536-42-4383	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	MASCOLL, JOHN O	413-23-9226	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	MURKERSON, EVELYN M	263-64-8293	11/10/94	3	2700	NUCLEAR OPERATIONS	E
W	NEAMAN JR, THOMAS J	072-34-6101	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	PASSMORE, WILLIAM L	254-52-4476	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	ROSS, PRESTON A	227-19-9207	10/28/94	3	2700	NUCLEAR OPERATIONS	E
	SKALA, JIRI	282-56-8704	10/28/94	3	2700	NUCLEAR OPERATIONS	E
XW	TABUTEAU, A ERIC	122-44-0545	10/28/94	3	2700	NUCLEAR OPERATIONS	E

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16 Exempt
2 Non-exempt

CONFIDENTIAL

	Employee Name	SSN	Term Date	Sen. VP	Dept. Num	Department Name	
W	ACTON, J LORRAINE	276-52-3418	10/28/94	6	2196	BUSINESS SYSTEMS S	N
	BARNES, ELAINE R	262-82-5071	10/28/94	6	2537	PERFORMANCE SERVIC	E
R- W	BELL, BRUCE A	266-42-1079	10/28/94	6	2542	TECHNICAL SERVICES	E
R	BIRCH, DONALD C	267-40-8928	10/28/94	6	2537	PERFORMANCE SERVIC	E
W	BREEDEN, DONALD L	172-32-7612	10/28/94	6	2578	C R COAL PLANT -SI	E
	BROWN, RICHARD H	198-32-3470	10/28/94	6	2542	TECHNICAL SERVICES	E
W	CATLETT JR, THOMAS J	227-50-4829	10/28/94	6	2577	C R COAL PLANT - 1	E
W	CHOATE, LOUISE M	288-50-6794	10/28/94	6	2196	BUSINESS SYSTEMS S	N
W	HARRISON, RICHARD L	266-58-9403	10/28/94	6	1230	FUELS SUPPLY DEPAR	E
R- W	HART, WILLIAM J	263-58-7952	10/28/94	6	2531	LABOR RESOURCES	E
W	HOLTON, JAMES O	265-82-8395	10/28/94	6	2537	PERFORMANCE SERVIC	E
	MOORE, MICHAEL E	510-50--8724	10/28/94	6	2510	ENGY SUPPLY PLANT IMPROV	E
	MORRIS, DAVID B	019-34-2679	10/28/94	6	2510	ENGY SUPPLY PLANT IMPROV	E
W	PRYSLAK, THOMAS M	063-40-8230	10/28/94	6	2510	ENGY SUPPLY PLANT IMPROV	E
W	PUTNAM JR, TRAVERS D	262-90-2052	10/28/94	6	1230	FUELS SUPPLY DEPAR	E
R- W	RICHARDSON, W B	250-38-2472	10/31/94	6	2578	CR COAL PLANT - SI	E
W	STEMLEY, RODNEY GLEN	435-90-6493	10/28/94	6	2537	PERFORMANCE SERVIC	E
	URBAN, ROBERT A	375-48-9500	10/28/94	6	2510	ENGY SUPPLY PLANT IMPROV	E
	WIMS, JAMES L	266-53-6322	10/28/94	6	2578	C R COAL PLANT -SI	E

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CONFIDENTIAL

	Employee Name	SSN	Term Date	Sen. VP	Dept. Num	Department Name
	ADAMS, CHARLOTTE S	426-68-6451	4/30/95	2	1160	CUSTOMER ACCOUNTIN
	BARGAR, STEPHEN R	265-11-8349	3/31/95	2	1170	PLANT AND DEPR ACC
W	BENNETT, PATRICIA J	208-34-8085	10/28/94	2	1130	ACCTS PAYABLE & DI
	BRATCHER, SUSAN H	262-17-1757	3/31/95	2	1160	CUSTOMER ACCOUNTIN
	BRIER, TANDY L.	206-36-6496	3/31/95	2	1101	FINANCIAL REPORTIN
	CAIN, DEBORAH M	266-11-4409	3/31/95	2	1170	PLANT AND DEPR ACC
	COOK, GERTRUDE B	218-24-9964	1/31/95	2	1140	PAYROLL
W	GRIMES, PAMELA A	262-17-4701	10/14/94	2	1090	BUSINESS PLANNING
	HEY, LINDA M	265-11-9136	1/31/95	2	1101	FINANCIAL REPORTIN
	JAKEL, FRANCIS J	166-34-0700	1/31/95	2	1130	ACCTS PAYABLE & DI
	KINZEL JR, KENNETH A	261-23-0728	11/28/94	2	1115	PRINTING SERVICES
W	MATHERS, MICHAEL R	269-40-3956	10/14/94	2	1090	BUSINESS PLANNING
	MCWILLIAMS, DEVERE A	406-54-4663	3/31/95	2	1170	PLANT AND DEPR ACC
	PFISTER, WADE R	263-96-6263	12/1/94	2	1170	PLANT AND DEPR ACC
	SCHILLO, BARBARA A	265-94-5125	3/31/95	2	1120	REGULATORY ACCTG
	SCHOBEL, TERRY L	261-29-8769	10/28/94	2	1101	FINANCIAL REPORTIN
W	SHANNON, TERRANCE F	267-75-9405	10/28/94	2	1115	PRINTING SERVICES
	SHIFLETT, R DARWIN	526-48-9611	6/30/95	2	1160	CUSTOMER ACCOUNTIN
	SNIDER, SARAH A	266-04-0548	3/31/95	2	1170	PLANT AND DEPR ACC

Electric Fuels Corporation
Career Transition

Name	Employment Date	Effective Date
Kris L. Carlson	4/27/93	7/31/96
Sherilyn K. Crittenden	9/26/94	7/31/96
Marilynn S. Duncan	7/27/92	7/31/96
Debbie Ericksson Perry	5/01/89	7/31/96
Sylvia R. Glenn	8/17/92	7/31/96
Michele M. Migeot	5/04/92	7/31/96
Larry W. Moore	9/06/94	9/30/96
Margaret M. Nyland	5/18/92	7/31/96
Darcy L. Stafford	1/11/94	7/31/96
Lynden F. Valentine	12/18/89	7/31/96

[EXHIBIT T – Plaintiffs' Answer to Interrogatories Omitted In printing]

[EXHIBIT U – Plaintiffs' Affidavits Omitted In Printing]

EXHIBIT V

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JAMES AKIN, et al.,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION, et al.

Defendants.

CASE NO.
97-173-Civ-Oc-10C

WANDA L. ADAMS, et al.,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Defendants.

CASE NO.
95-123-Civ-J-10A

AFFIDAVIT OF SUSAN LONG, PH.D.

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned officer, duly authorized to administer oath, appeared SUSAN LONG

well known to me who upon oath says and deposes as follows:

1. My name is SUSAN LONG, and I am over the age of eighteen.
2. I hold a bachelor's degree in finance received from Syracuse University in 1971 and a doctorate in statistics, economics and finance received from the University of South Carolina in 1976.
3. I have been qualified as an expert in the field of statistics and economics for over ten (10) years. *See Resume attached as Exhibit A.*
4. I have testified in over fifty (50) cases for both the defendants and plaintiffs in state and federal court.
5. I have been asked to assume that the statistical evidence supplied to me is valid.
6. It is my opinion that in cases involving large scale Reduction in Force or downsizing the process is by its very nature a "Top-down" process, originating from senior management and carried out by those at lower levels. Further statistical analysis needs to be conducted which takes into account the entire population of the employees so that reliable data can be proffered as to the disparate impact on the Plaintiffs regardless of whether a subjective or objective process was used.
7. Pursuant to my review of the documents provided to me by the Plaintiffs in this matter, and my experience as an expert in the field of statistics, it is my opinion that Florida Power's corporate leaders and senior management set the parameters for the Reduction in

Force and downsizing process that occurred at Florida Power and directed the lower levels to carry out these directives which resulted in the disparate impact upon Florida Power's older employees.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Susan Long
SUSAN LONG, PH.D.

SWORN TO AND SUBSCRIBED before me, by SUSAN LONG who is either personally known to me or who has produced DRIVER'S LICENSE as identification, this 24th day of SEPT., 1998.

/s/ Cheryl A. Scalzo
Notary Public, State at Large
My Commission Expires:

[SEAL]
CHERYL A. SCALZO
MY COMMISSION #CC 732243
EXPIRES: April 8, 2002
Bonded Thru Notary Public Underwriters

EXHIBIT A

Susan W. Long, Ph.D.
P.O. Box 9793, Tampa, Florida 33674-9793 -
(813) 234-7144 - FAX: (813) 232-0061 - e-mail:
SWLong@email.msn.com

Dr. Susan W. Long is president of S.W. Long and Associates, a litigation support business located in the Tampa Bay area. Dr. Long does economic valuations for divorce, personal injury, wrongful death, wrongful discharge, discrimination, business damages, labor and Employment law and other litigation-related issues. She also does the statistical analysis for employment discrimination. She has qualified in court as an expert witness in most Florida Counties as well as Richland County in South Carolina, St. Mary Parish in Louisiana, Harris County in Houston, Texas, federal court and tax court.

Dr. Long received her Ph.D. in finance economics and statistics at the University of South Carolina in 1976. She was a university professor in statistics, economics and finance from 1975 through 1989. While teaching full-time Dr. Long provided expert economic and statistical testimony on litigation issues on a part-time basis. In 1988, Dr. Long began providing litigation support on a full-time basis.

Dr. Long is licensed by the state of Florida in Real Estate. She is a member of the Institute of Business Appraisers and an Associate Member of the Hillsborough County Bar Association. She was the founding president of the West Central Florida Chapter of the Institute of Business Appraisers.

Dr. Long is listed in Who's Who in the Southeast, Who's Who of Emerging Leaders and Who's Who Women of the World. She is a frequent contributor to *Fair$hare*, a journal in matrimonial law.

Dr. Long's professional publications include articles on economic losses in personal injury, how to handle illiquidity in equitable distribution, pension valuation, business declines during divorce and economic losses in personal injury and business litigation. In addition, Dr. Long has published numerous articles in areas of corporate finance, portfolio management and applied statistics. Dr. Long has been an invited speaker at the Financial Management Association, the Hillsborough County Bar Association's Marital Law Section, Hillsborough County Bar Association's Solo Practitioner's Section, the Professional Association of Professional Investigators, Eastern Finance Association and numerous other professional associations.

Susan W. Long, Ph.D.
P.O. Box 9793, Tampa, Florida 33674-9793 - (813) 234-7144
- FAX: (813) 232-0061
e-mail: SWLong@email.msn.com

EDUCATION:

Ph.D.	University of South Carolina (1976) Concentration: Finance, Economics and Statistics
M.B.A.	University of South Carolina (1975) Concentration: General Business

B.S. Syracuse University (1971)
Concentration: Major - Finance; Minor - Statistics;
Minor - Data Processing

PROFESSIONAL EXPERIENCE:

Consultant:

1991-Pres. **S.W. Long & Associates.** Business Appraisals, Pension Valuation, Business Damages, Economic Losses in Personal Injury, Wrongful Death and Medical Malpractice. Statistical Analysis in Labor and Employment Law, Valuation of Business Damages, Valuation of Lost Services. Determination of Effective Interest Rates. Qualified in circuit, state and federal courts as an expert.

1982-1996 **Private Consulting practice.** Financial and Economic Consulting in Business Valuation; Pension Valuation; Business Damages and Personal Injury. Qualified in circuit state and federal courts as expert.

1978-1982 **C & S Research Associates**, Ypsilanti, Michigan. Statistical and Financial Consulting for political candidates and business entities.

Banker:

1971-1972 **Bankers Trust of South Carolina**, Columbia, South Carolina. Sr. Financial Analyst. Acquisition Analysis, Budgeting, Competitor Analysis.

Teaching:

1997-Pres. **University of Sarasota**, Sarasota, Florida. Associate Professor of Finance. Teach and do research in finance and statistics at Masters and Doctoral level.

1996 **St. Leo College**, St. Leo, Florida. Adjunct Professor of Finance.

1991 **University of Tampa**, Adjunct Professor of Finance, Tampa, Florida.

1990-1991 **Webber College**, Visiting Professor of Finance, Babson Park, Florida.

1982-1988 **University of South Florida**, College of Business Administration, Associate Professor of Finance.

1978-1982 **Eastern Michigan University**, College of Business, Associate Professor of Finance.

1975-1978 **East Carolina University**, College of Business, Assistant Professor of Finance.

OTHER EXPERIENCE:

* Trial testimony in municipal, circuit, state, and federal courts on various actions including business valuation, financial & economic analysis, pension valuations and economic losses in personal injury, wrongful death, age and sex discrimination.

* Organized, developed and participated in professional development programs in statistics, finance and finance related areas for various organizations including

American Banker Association, Credit Women International, and Women's Political Caucus.

* Secretary, Tampa Bay Chapter of ASA, 1994-1996, Director Mentor Program, Houston Chapter ASA, 1996-1997.
* Board of Directors, Tampa Crossroads, 1995-Present.
* Successfully completed training in Family Law Mediation, 1994.
* Successfully completed ASA certified course in Unified Standards of Professional Appraisal Practices, 1994.
* President, West Central Florida Chapter - IBA, 1992-1994
* Director, Whitestone Consulting Group, Inc., financial and economic consulting firm, 1988-1991.
* Editor: FMA Collection, 1983-1991.
* Treasurer, Air Care Alliance, Inc., 1991-1996.
* Treasurer, Angel Flight of Florida, Inc., 1984-1992; Director, 1984-1996.
* Reviewer: Journal of Financial Research, 1977; and Decision Sciences, 1984, 1986-1988, Journal of Accountancy, 1993.
* Program committee, Midwestern Finance Association (1986) and Eastern Finance Association, 1985 & 1988.
* Created and maintained WEDU'S Florida Based Stock Market Index, 1982-1985.

* Licensed in Florida (1988-Pres) and Texas (1996-Pres) Real Estate.
* Member American Arbitration Association Panel of Arbitrators.
* Initiated and organized the first Battered Spouse Safe House in E. North Carolina.

HONORS/AWARDS/MEMBERSHIPS:

* Member Omicron Delta Epsilon, National Economics Honorary
* Professional membership in Institute of Business appraisers.
* Treasurer, Executive Women in Sales and Marketing (1990-1992).
* Treasurer, Tampa Bay Network, National Association of Female Executives (1990-1991).
* Member Alpha Iota Delta, National Honorary in Decision Sciences (Treasurer 1981-82).
* Grace Vedder Fellow, Syracuse University (1970-1971).
* Who's Who Women of the World, 1982, 1989, Who's Who Women of the South, 1991, 1993, 1995, Who's Who Emerging Leaders, 1991.
* Treasurer, Vestryman and Building Committee, St. Mark's Episcopal Church, 1986-1988.
* Founding Director and Secretary, The New Cherokee Club of Ybor City, Tampa, 1990-1991.

SELECTED PUBLICATIONS:

"Problems in Equitable Distribution of Personal Injury Awards," Family Law Commentator, Florida Bar Association, Summer, 1994, Co-authored.

"Checklists for Military, Civil Service, and Civilian Pension Valuation Information, Fair$hare, Prentice Hall Law & Business, December, 1993.

"The Expert's Frustration with the Attorney," Lawyer, Hillsborough County Bar Association, October, 1992.

"Personal Injury Losses: The Economic Realities that are Obvious (Obscure)," National Forensic Center Journal, Summer, 1992, (co-authored).

"Understanding a Decline in Business Value During Divorce," FAIR$HARE, Division of Prentice-Hall, 1992, (co-authored).

"Handling Illiquidity in the Actual Distribution," FAIR$HARE, Division of Prentice-Hall, May, 1991, (co-authored). Reprinted in Encyclopedia of Matrimonial Law, Prentice-Hall, 1992

"Problems in Easy Pension Valuations," TRIAL, April, 1991, (co-authored).

"A View from the Big Guava," Florida Growth Report, monthly economic column, February 1991-February, 1992, (co-authored).

"Pension Valuation", FAIR$HARE, Division of Prentice-Hall, February, 1991, (co-authored). Reprinted in Encyclopedia of Matrimonial Law, Prentice-Hall, 1992.

"Economic Losses in Personal Injury from the Obvious to the Obscure," Experts-At-Law, July-August, 1991, (co-authored).

"A comment on the Application of corporate Finance to the Courtroom: The Case of Damage Valuation," Financial Management, Spring, 1990, (co-authored).

"An Analysis of the Effects of Bank Mergers," Journal of the Midwest Finance Association, 1987.

"A Note on Cyclical and Dynamic Aspects of Stock Market Price Cycles," Financial Review, Summer, 1986, with S. Bolten.

"Deferred Taxes: Do They Smooth and Deflate? – Abstract," Financial Accounting, Spring, 1985, with Steven Bolten.

"Risk-Premium Curve v. Capital Market Line: Differences Explained," Financial Management, Spring, 1978.

"The Invalidity of Beta," Proceedings of the 1982 Southwestern Finance Association Meeting, Dallas, Texas, March, 1982.

"Measuring the Responsiveness of New Equity Issues to Risk and Return," Proceedings of the 14th Annual Meeting of the Eastern Finance Association, Atlanta, GA, April, 1978, with Jerry Hunt.

"A Note Extending Risk-Premium Analysis to Convertible Bonds and Real Estate," Proceedings of the 1978 Annual Meeting of Southeastern American Institute of Decision Sciences, Jacksonville, Florida, February, 1978, with Richard Stevenson.

"An Empirical Test of Inter-industry Changes in Financing Mix," Proceedings of the 1978 Southwestern Finance Association Meeting, Dallas, Texas, March, 1978 with Jerry Hunt.

"Inter-industry Changes in Financial Position," Proceedings of the 13th Annual Meeting of the

Eastern Finance Association, Boston, Massachusetts, April, 1977, with Jerry Hunt.

Ph.D. Dissertation - "Market Indices and Their Effects on Betas," 1976.

SPEECHES, PAPERS AND MEETINGS:

"Experts: How to Find Them and Keep their Costs Down," Speech given to Hillsborough County Bar Association, Solo Practitioners Section, November, 1993.

"Valuing Your Business," Speech given to Town 'n Country Rotary, Spring, 1993.

"Finding Value in the Small Business," Speech given to Professional Association of Private Investigators Annual Leadership Conference on Fraud, October 2, 1992.

"The Pitfalls of Entrepreneurship", Speech given to Women Business Owner's 1st Annual Conference on Entrepreneurship, September, 1992.

"Pension Valuation," Speech given to the Marital Law section of the Hillsborough County Bar Association, September, 1990.

"Analysis of Factors in Bank Mergers and Acquisitions," was presented at the Southern Finance Association Meetings, New Orleans, Louisiana, November, 1986, (co-authored).

"Synergism in Bank Mergers and Acquisitions," Southwest Finance Association, Houston, Texas, March, 1987, (co-authored).

"Bank Mergers and Acquisitions," Eastern Finance Association, Baltimore, MD, April, 1987, (co-authored).

"The Appropriate Market Holding Period for Portfolio Performance Measures: Evidence from the Decomposition of the cycle," Eastern Finance Association, Nashville, TN, April, 1986, (co-authored).

"Constructing a Local Stock Market Index: A Case Study," Eastern Finance Association, Buena Vista Village, FL, April, 1984, (co-authored).

"Beta: How Much Information Does It Contain?" North American Economics and Finance Association, Mexico City, Mexico, July, 1984 (co-authored).

Annual attendance at various professional meetings and seminars since 1975.

References and Client List upon Request.

[**EXHIBIT W** – Affidavits from Plaintiffs, William E. Hoover, Richard G. Merriman, George Allen Suban, Chester Wagoner, and Janet E. Smith Omitted In Printing.]

[**EXHIBIT X** – Affidavit of Lorin Bryan Omitted In Printing.]

[**EXHIBIT Y** – Trial Testimony of David Miller in *Burke v. Florida Power*, No. 96-1184, Omitted In Printing.]

[**EXHIBIT Z** – 1992 Evaluations of Jim Smith, Janet Smith and Doug Janowski Omitted In Printing.]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA ADAMS, ET. AL.,

Plaintiffs,

v.

CASE NO.:
95-123-CIV-OC-10A

FLORIDA POWER CORPORATION, and FLORIDA PROGRESS CORPORATION,

Defendants.
_____/

PLAINTIFFS' AMENDED RESPONSE TO DEFENDANT'S MOTION TO DECERTIFY AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, the Plaintiffs, WANDA ADAMS, et al, by and through their undersigned attorney, and submits this Response to the Defendant's Motion to Decertify this case as a class action and says that the Defendant's Motion should be denied.

STATEMENT OF THE CASE

This case was originally filed in 1995 by seventeen (17) original Plaintiffs. Later thirty-nine (39) additional Plaintiffs were allowed to join this lawsuit by amendment. The case was then conditionally certified and sixty-one (61) former employees of the defendant opted in to

this age discrimination lawsuit.[1] In the Court's Order that was entered on June 22, 1998, the Court did dismiss all of the ERISA claims of the Plaintiffs. The claims now pending before the Court are the Federal ADEA claims of all Plaintiffs except Boyle, Engers, Maraget and Owens, and all of the State discrimination claims under the Florida Civil Rights Act of 1991 alleging age discrimination, and these are pending for all Plaintiffs.

PLAINTIFFS' FORECAST OF THE EVIDENCE AS IT RELATES TO CLASS CERTIFICATION

In May of 1992, the Defendants, Florida Progress Corporation and its wholly owned subsidiary, Florida Power Corporation purported to make a decision to

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[1] The Court dismissed the ADEA claims of Plaintiffs Boyle, Engers, Maraget and Owens. The Court did not dismiss the age discrimination claims of Boyle, Engers, Maraget and Owens that were filed under the Florida Civil Rights Act of 1991, *Fla. Stat.* §760.01-760.11. The claims of Boyle, Engers, Maraget and Owens under *Florida Statutes* for age discrimination are the same as the other 111 plaintiffs who also have the same State claim for violation of the state age discrimination law.

The defendants state on page 4 of their motion to decertify, in footnote 1 that the court dismissed the FCRA claims of the original plaintiffs, Brannon, Cutlet, Gauldin, Janowski and Pennington. Nowhere in the Order entered by this Court on June 19, 1998, is there any mention of the Court dismissing the FCRA claims of the plaintiffs, Brannon, Catlett, Gauldin, Janowski and Pennington. The FCRA claims of those named plaintiffs are still pending before this Court. The Court only granted Florida Power Corporation's motion for summary judgment as it applied to the release that was signed and as the release applied to the FCRA claims. The FCRA claims were not dismissed.

downsize Florida Power Corporation. This single policy was implemented in the Fall of 1993. This policy was developed by the President of Florida Power Corporation in conjunction with Jack Critchfield, who is the President of Florida Progress Corporation. This policy, pattern and practice of age discrimination filtered down from the presidents of both corporations through various vice-presidents called a PACE Team and ultimately led to the termination of approximately 556 employees. Of the 556 employees, approximately 382 or 73% were over the age of forty.

STATEMENT OF PERTINENT FACTS

On May 22, 1992, Allen Keesler, Jr., who was the president of Florida Power Corporation prepared a memorandum for an organizational design task force implementing a strategic plan for Florida Power Corporation to reduce its work force with the goal of having in January 1994, the same number of employees that Florida Power Corporation had in January 1991. (See Exhibit "A")

On January 4, 1993, Allen J. Keesler, Jr., testified before the Florida Public Service Commission, under oath explaining his intent to downsize the company. (See Exhibit "B") Mr. Keesler passed this information through his senior officers and instructed them to come up with a way to reach his goals. (See Exhibit "B", pages 10 through 13) Mr. Keesler testified that his immediate staff was Mr. Green, Mr. Neiser, Mr. Phillips, Mr. Beard, Mr. Hancock, and Mr. David Miller. (See Exhibit "B", page 13)

Mr. Keesler's senior staff then utilized what was called a Senior PACE Team. Mr. John Hancock who was a

Senior Vice-President for the Florida Power Corporation also testified before the Public Service Commission on February 15, 1993. In his deposition, he testified that he, along with other senior staff officers were part of a PACE Team, and that they were responsible for working out the work force reduction plan or goal. (See Exhibit "C", page 6) Mr. Maurice Phillips, who was a senior officer and a part of the PACE Team drafted a memorandum dated September 21, 1992, which provided information regarding the position reduction targets. (See Exhibit "D") John Hancock testified that the things that were discussed by the PACE Team included better ways of identifying employees who were not pulling their weight and "I think emphasis on the point of are things that we are doing that perhaps in today's climate don't bring value added, and how we might deal with those." Mr. Hancock stated in his deposition that the PACE Team talked about concepts, approaches, feasibility in terms of making this long term achievement. (See Exhibit t [sic] "C", pages 12 and 14) Mr. Hancock testified in his deposition that he had seen the letter drafted by Maurice Phillips dated September 21st. (See Exhibit "D") Mr. Hancock also stated that "the PACE Team had agreed in concept as a Senior Management Team from the standpoint of what they wanted to go after." (See Exhhibit "C", page 15)

Maurice Phillips, who was an Executive Vice-President for Florida Power Corporation testified in his deposition before the Florida Public Service Commission that the reduction in force and the memo from Allen Keesler dated May 22, 1992, were areas of focus for the PACE Team. (See Exhibit "E", pages 7 and 8)

George E. Green, III, who was a Senior Vice-President for Florida Power Corporation was also part of the PACE Team. Mr. Green testified that the first meeting for the PACE Team was August 11th, that Allen Keesler came to the meeting, and that they discussed his goal to reduce the company at that time by 150 people. (See Exhibit "F", pages 5, 6, and 7)

The reason that the deposition testimony of Allen Keesler, John Hancock, George Green and Maurice Phillips are relevant to this Response is that one of the plaintiffs in this lawsuit, Patsy Yates Baynard, attended some of these same meetings. Ms. Baynard states in an Affidavit, (Exhibit "G"), that from 1990 through 1992 the Company started offering early retirement packages to employees in their fifties. It was made known to Ms. Baynard through Phil Henry, who was a Senior Vice-President of Engineering and Construction, that if she knew anyone who had been offered an early retirement package that they should take it, otherwise they would be the victims of downsizing.[2] Ms. Baynard also states in her Affidavit that in late 1992 and 1993 she was a member of the Strategic Planning Committee, which included Richard Korpan, Executive Vice-President of Florida Progress Corporation, Patricia Blizzard, Director of Environmental & Licensing Affairs, Susan Johnson, Director of Strategic Planning, Allen Keesler, President of Florida Power Corporation and Vice-Presidents, John Hancock, Richard Neiser, Joe Cronin, Maurice Phillips, Philip Henry and George Green. Ms. Baynard states that as a part of the

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[2] See Interrogatory Answer of Mark Foster in Exhibit U pp. 55-58.

preparation of the planning process, a statistical evaluation was completed on the work force to correlate age, years of service, cost of benefits and liabilities at the time of retirement. She states in her Affidavit that one of the goals was to get rid of older employees, reduce costs and bring younger employees into the work force. During one of the meetings at Howey-in-the-Hills, Florida, Mr. Korpan stated that "If employees had been with the company for over five years, they were part of the problem, rather than the solution to meet the competitive needs of the future." He also suggested that Florida Power needed to "get rid of older people," stating that "older people had nothing to contribute to the corporation," Ms. Baynard stated that the downsizing effort came from the highest levels of management of Florida Progress and Florida Power. (See Exhibit "G", page 3)

Another Plaintiff in this case, Cynthia Behrens-Boga, was a confidential secretary for Florida Power Corporation. She has stated in an Affidavit that there was what was commonly referred to as a "birthday book" distributed amongst directors and managers and Vice Presidents listing all employees alphabetically, and giving their dates of employment, social security number, salary and date of birth. She further states that the book was stamped "Confidential," and that she was told to keep the information in the book confidential. (See Exhibit "H")

This reduction in force started out in what was known as the redeployment process. In this progress employees were told they were being downsized, but that they could bid on jobs within the company. If they did not find a job with the company within six months, they

would be terminated. (See Exhibit "I") The Plaintiffs were replaced mostly by younger employees under 40 and of the Plaintiffs that did bid on other jobs within Florida Power Corporation, none were given any available positions. These Plaintiffs were qualified to do the jobs that they were doing and to do many other jobs which were available within the company. (See Affidavits of individual Plaintiffs – Exhibit "U") Indeed, no poor performers were even eligible to go into the redeployment program. (See Exhibit "K") The redeployment program was then changed to a career transition process. The only difference in the career transition process was that the employee signed a release and was terminated. The employee could receive up to six months of severance pay. Here again, no poor performers were eligible to participate in the career transition process. (See Exhibit "L")

The Plaintiffs did work in various positions throughout Florida Power Corporation. The Plaintiffs were not members of any bargaining unit and all were salaried employees. (See Exhibits "M", "N" and "O") While the Plaintiffs that were downsized worked at various positions and various departments at various locations for the Defendants, all had the following in common:

1) The Plaintiffs were all victims of the same single policy to reduce the older workers from the work force at Florida Power Corporation. This is evidenced by the depositions of Senior Executive Officers (See Exhibits A, B, C, and D) and the Affidavit of Patsy Baynard. (See Exhibit "G");

2) This same single policy continued through the redeployment and career transition process. This is evidenced by a memo from Pat Blizzard to Edna Jones dated November 16, 1994, where numbers are compiled for the three downsizing programs which were redeployment, early retirement, and career transition. (See Exhibit "P") The Plaintiffs in this case do not include employees who left in the early retirement program. See also a Memo to Pat Blizzard from P. Waters, subject "Career Transition Process" date 10/25/94, which breaks down the employees by age, race, and sex. (See Exhibit "Q") It might be noted in Exhibit "Q" that as of October 25, 1994, out of 209 employees downsized, 149 were over the age of 40;

3) In a Memo dated August 3rd, 1995, from Pat Blizzard to Senior Staff, there is a report given to Senior Staff, of employees who have gone through the career transition process. (See Exhibit "R") See also Memo dated November 13, 1994, from P.K. Blizzard to R Korpan and A.J. Keesler. (See Exhibit "S") This memo demonstrates that the downsizing and policy of age discrimination came from senior management and not middle management. See the attached Affidavit of Susan Long, Ph.D. (Exhibit "V") A large scale reduction in force or downsizing by its very nature is a top-down process carried out from senior management and carried out by those at lower levels. (*Id.*) Dr. Long also states in her Affidavit that, based upon the documents she reviewed, the Defendants' reduction in force and downsizing process had a disparate impact on Florida Power's older employees (*Id.*);

4) All of the Plaintiffs in this case were obviously over 40 years of age and most had a significant employment history with the Defendants;

5) At the time of their termination all were qualified for their jobs and were receiving satisfactory or better evaluations. (A fact evidenced by their eligibility for the career transition and redeployment programs.);

6) At the time of their termination most were replaced by younger people, less than forty years of age, with less experience and less time with the Company. (See Plaintiffs' Answers to Interrogatories marked as Exhibit "T". It might be noted that page 1 of Exhibit "T" is the interrogatory in question and the rest of the attachments are the answers to interrogatory number 1.) See also Composite Exhibit "W1" through "W5", which are Affidavits from Plaintiffs, William E. Hoover, Richard G. Merriman, George Allen Suban, Chester Wagoner, and Janet E. Smith;

7) All of the employees were told that their jobs were being eliminated. This was simply false. See Plaintiffs' interrogatory answers in Exhibit "T" and the Plaintiffs' Affidavits in Exhibit "U", which show that the majority of the jobs were not abolished.

8) All of the Plaintiffs were qualified and capable of doing other jobs within the company and other jobs were vacant and being filled. (See Exhibits "T" and "U");

9) None of the Plaintiffs were given jobs that they applied for or were told not to apply. (See Exhibits "T" and "U")

ARGUMENT AND MEMORANDUM OF LAW

The Plaintiffs have filed this age discrimination lawsuit under the Age Discrimination and Employment Act, 29 U.S.C. § 621 and the Florida Civil Rights Act under *Fla. Stat.* § 760.01 to § 760.11. The Plaintiffs' Sixth Amended Complaint makes it very clear that the Plaintiffs' claims are based on a pattern and practice of intentional age discrimination (disparate treatment) and that the Defendants' redeployment program and career transition process had a disparate impact on a protected class over the age of forty. The Complaint does not contain specific details applying only to individual Plaintiffs. The only facts that would apply to individual Plaintiffs are that they were the victims of a single policy of age discrimination, over the age of forty at the time of their termination, qualified for the jobs that they held, qualified for other positions within the Defendants' corporation, not allowed to obtain other positions within the corporation, replaced by younger people, and that the explanations offered by the defendants for the termination are pretextual.

It is interesting that the Defendants now attempt to cite poor performance on the part of some of these Plaintiffs as the reason for their termination. The claim conflicts with the Defendants' express policy that *no* poor performers were eligible to be placed in the redeployment program or receive a career transition package. (See Exhibits "K" and "L") An example is Lorin Bryan now accused of sexual harassment. The claim is false. (See Exhibit "X")

The only Plaintiff that has a claim that was even remotely different than the rest of the Plaintiffs, is Kermit

Lassiter. Kermit Lassiter has been severed by the Court and will be tried separately.

On page 9 of their Motion, the Defendants make reference to the Affidavit of David Miller. In Mr. Miller's Affidavit he states that the company needed to implement cost-cutting efforts to survive in the changing utilities environment. Mr. Miller also testified in the case of *Patrick Burke v. Florida Power Corporation*, in the Federal District Court in the Tampa Division, Case No. 96-1184. There, in Volume III, page 324 (Exhibit Y-1) of his trial testimony, Mr. Miller stated that Florida Power conducted no cost analysis whatsoever before downsizing. Mr. Miller now states in his Affidavit, "In the areas under my responsibility I asked my directors or department heads to determine the means by which they could reduce costs. I provided no instructions as to what methodology to use to accomplish the cost reductions." Mr. Miller testified in the *Burke* case that he used a banding process that he selected from Anderson Consulting to rank his employees. Again in Volume III. pages 304 and 305, (Exhibit Y-2) of the *Burke* trial transcript, Mr. Miller stated that he used the banding process, discussed it with his management team, and ultimately used it to rank his employees. Mr. Miller now states in his Affidavit that he was not reducing staff to cut costs, instead he was trying to address management concerns. In Volume III, pages 343 through 344, (Exhibit Y-3) of the *Burke* transcript, Mr. Miller testified under oath that in reorganizing or restructuring or downsizing one of his goals was to reduce

costs.[3] Mr. Miller states in his affidavit that he instructed his managers to meet in a group and to rank the employees, and that he wanted all of his managers who had experience with the employees to provide input. This is interesting in light of one of Mr. Miller's managers' testimony in the *Burke* trial. Mr. Wesley Strain testified in the *Burke* trial that he supervised three employees and that he had *never* heard of a banding process until after the employees had been laid off, and that he had no input into the banding. (Volume IV, page 484-485 Exhibit Y-4)

On page 22 of the Defendants' Motion, the Defendants allege that Jim Smith, Janet Smith, and Doug Janowski's positions were abolished. Each of these three Plaintiffs had approximately 20 years with the Defendant at the time of their termination. In their 1992 evaluations, they were rated either average or above average. (See Exhibits Z1, Z2 and Z3) All three were placed in the redeployment pool and were supposed to be able to bid on jobs that were available in the company. None of the Plaintiffs were given any available jobs with the Defendants.

The Defendants state that when the Plaintiff, Janet Smith was placed in the deployment pool she had not turned forty years of age. Ms. Smith was placed in the deployment pool and turned forty years old the next week. She remained employed with the Company and

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[3] David Miller was also a member of the same Pace team that organized this reduction in force. See Exhibits A,B,C and D; see also Exhibit U p. 151 and Exhibit Ab, which is a highlighted chart of the people over 40 terminated from Miller's department.

able to bid on other job, until June 1994, at which time she was terminated, as she was not offered any other job within the Company. At the time of her termination, the Plaintiff, Janet Smith, was 40 years and 6 months old. (See Exhibit "W-4")

The Defendants argue that the Plaintiff should not be allowed to proceed under the Florida Civil Rights Act as a Class. The Plaintiffs would submit that they should be allowed to proceed under the Florida Civil Rights Act as a class, as it pertains to liability. The only difference between the state statute prohibiting age discrimination and the federal statute prohibiting age discrimination is that the damages available under the state statute are broader. The Court has already suggested that if this case goes forward as a class that it would be a trial on liability. this can be tried under both state and federal law, as a class since the issues of law and the facts to be entered into evidence would be identical. (See Exhibit "J")

Next the Defendants raise the issue of whether the Plaintiffs should be able to piggyback on the Complaint filed with the EEOC by Janet Smith, claiming that charge was the earliest valid one that made a reference to targeting older, long-term employees. The Defendants are correct that the Plaintiffs should be allowed to rely on that charge, as Janet Smith was terminated from her employment with the Defendants after her fortieth birthday. The Defendants have not made any reference, however, to the charge of discrimination that was filed with the EEOC by William E. Hoover on April 5, 1994, five months before Janet Smith's EEOC charge was filed. On the last page of Mr. Hoover's charge to the EEOC, it states "in addition to

the Information Services Department, many other departments at Florida Power Corporation, have placed management and professional employees in the six-month redeployment process. The vast majority of these employees are over forty-five years old." This charge by Mr. Hoover also puts the EEOC and the Defendants on notice that the allegation of age discrimination is widespread throughout the Defendants' corporation. (See Exhibit "W-I")

The Defendants appear to be taking the position that if this case proceeds forward that it is somehow going to bankrupt the Defendants. It might be noted that in the last *quarter* of 1998 the Defendants had a *net* income of $77.8 million dollars from Florida Power Corporation alone. (See Exhibit "Aa") The Plaintiffs would submit that the potential damages in this case are irrelevant as it applies to whether or not this case should be certified as a class action.

Plaintiffs in this case have moved to collectively pursue their claim under § 7(b) of the ADEA (codified at 29 U.S.C. §626 b) incorporates the opt-in class action provision of the Fair Labor Standards Act §216 (b) provides that:

> An action to recover the liability prescribed . . . may be maintained against any employer in any federal or state court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

The leading case from the Eleventh Circuit is *Grayson v. K-Mart Corp.*, 79 F.3d (11th Cir. 1996). The *Grayson* court stated that "Plaintiffs need show only that their positions

are similar, not identical to the positions held by the punitive class." Furthermore, Congress has stated its policy that "ADEA plaintiffs should have the opportunity to proceed collectively." *Id.* at 1095. According to *Grayson*, the plaintiffs bear the burden of demonstrating a "reasonable basis for their claim of class-wide discrimination." The Plaintiffs may meet this burden, *which is not heavy*, "by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which 'successfully engage defendants' affidavits to the contrary."

The plaintiffs in this response have submitted sufficient affidavits and deposition testimony which showed that this was a single policy developed by top executives of Florida Progress Corporation and Florida Power Corporation which the defendants used to purge some of their middle management and professional positions of older employees. All of the employees were salaried and non-union.

A case on point, is *Thiessen v. General Electric Capital Corp.*, 996 F.Supp. 1071 (Dist. Ct. KS 1998). In *Thiessen*, the facts showed that there were significant differences among the opt-in plaintiffs, both in terms of employment situation and alleged discriminatory treatment. The opt-in plaintiff group consisted of individuals who held dozens of different positions (each with different requirements and responsibilities) across seven states. The plaintiffs ranged in age from 45 to 60 and ranged in tenure from 4 years to 31 years. They were supervised by many different individuals and they represented three of five salary grades with a range from $25,000.00 to $75,000.00 in salary. One thing that the court noted is that neither

the FLSA nor the ADEA defines "similarly situated," and the Tenth Circuit has not had the opportunity to discuss the meaning of the phrase. Indeed, very few circuit courts have addressed the appropriate standard for determining whether plaintiffs are similarly situated under §216(b).[4]

The defendant, in *Thiessen* argued that the plaintiffs were not similarly situated because of the vastly different employment situations and claims of the plaintiffs. The plaintiffs, in *Thiessen*, responded citing *Frank v. Capital Cities Communication, Inc.*, 1983 U.S. Dist. Lexsis 12947, No. 80-Civ-2188-CSH, 1983 W.L. 643 (7 Dist. NY Oct. 1983). In *Frank*, the defendants argued that the opt-in plaintiffs were not similarly situated because they held a wide variety of jobs and their specific complaints were not identical. *Id.* at page 2. Like Mr. Thiessen (and like the Plaintiffs here in this case before the Court), the Plaintiffs' theory was that each opt-in plaintiff had been the victim of "a plan by defendants to rid itself of its older employees through harassment and termination." *Id.* Although the court acknowledged that the claims of the opt-in plaintiffs were different, it reasoned that such claims "could all quite logically be manifestations of defendants' campaign."

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[4] Defendants rely on *Dybach v. State of Florida*, 942 F.2d 1562 (11th Cir. 1991). *Dybach* is not an ADEA case. It is a wage and hour case – with different elements, proof requirements and policy considerations.

Defendants also rely on *Brooks v. Bellsouth*, 164 F.R.D. 561 (N.D. Ala. 1995). In *Brooks*, the court denied the class because there was – unlike here – no evidence of a single plan.

Ultimately, the court certified 13 opt-in plaintiffs and stated:

> to deny them class treatment would be tantamount to declaring that any employer can escape ADEA class liability so long as it discriminates against a diverse group of aged employees over a wide geographic range in a number of ways, such as termination, salary, promotion, and working conditions.

The court in *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294 (N.D. Cal. 1991) adopted the same reasoning in *Thiessen, supra* and went on to state that

> The court believes the better view is that a class claim is not defeated simply because the proposed class performed a variety of different jobs at different locations, reported to different supervisors or left employment for different reasons than the named plaintiffs. What governs the scope of the class is whether the named plaintiffs and the class members were all affected by a similar plan infected by discrimination. The plaintiffs need not be identically situated to potential class members. Citing *Heagney v. European American Bank*, 122 F.R.D. 125 (E.D. NY 1988).

This is precisely what Defendants, Florida Progress and Florida Power are now asking this Court to do, that is, to allow them to escape ADEA class liability because the Plaintiffs worked in various positions throughout the company.

The court, in *Thiessen*, adopted the holding in *Frank v. Capital Cities Communications Inc., supra* stating that Mr. Thiessen came forward with direct evidence of an overall

policy of purported age discrimination. The Plaintiffs now before this Court have done the same thing in this response.

In *Thiessen*, the Defendants argued that the case should be decertified because the defendant had various defenses available. In response the plaintiffs relied on *Hyman v. First Union Corp.*, 982 F. Supp. 1, 1997 (D.D.C. 1997). In *Hyman*, the opt-in plaintiffs were terminated in 1992 and 1993. The opt-in plaintiffs alleged termination decisions were based solely on age. The defendants argued that the case should not be certified because the plaintiffs were not similarly situated because of the different defenses available, including good cause, business necessity and waiver. The court rejected First Union's argument. The *Thiessen* decision ultimately ruled in favor of the case proceeding as a class.

In *Vaszlavik v. Storage Technology Corp.*, 175 F.R.D. 672 (Dist. Ct. CO 1997), the plaintiffs alleged that the defendant engaged in a "pattern and practice" of discrimination against its employees during a reduction in force from April 13th, 1993 through December 31st, 1996. The court held that even applying the higher "similarly situated" standard, certification is appropriate for the liability phase of the plaintiffs' pattern and practice claim. The liability phase will determine: 1) whether defendant engaged in a pattern and practice of discrimination against its employees in violation of the ADEA from April 13, 1993, to December 31, 1996; 2) if so, whether the defendant acted willfully and wantonly; and 3) whether plaintiffs are entitled to injunctive or declaratory, class wide relief.

It might be noted that in the complaint filed by the *Adams* Plaintiffs in this case, alleges a "pattern and practice" of discrimination. (See Sixth Amended Complaint, paragraph 26)

In *Wilkerson v. Martin Marietta Corp.*, 875 F.Supp. 1456 (Dist. Ct. CO 1995), the plaintiffs alleged that they had been victimized by a pattern and policy of age discrimination which motivated a series of layoffs (reduction in force). The court found that other courts have found this type of allegation alone sufficient for class certification. The court found that the allegation of discrimination by the plaintiffs transcends the differences existing among levels of management responsibility, as well as differences stemming from employment in different divisions or operating units of the defendant corporation. Citing *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51-52 (3rd Circuit 1989). See also, *Heagney v. European American Bank*, 122 F.RD 125 (E.D. NY 1988) which held that former bank employees who were fired, laid off, or allegedly forced to resign could "opt-in" to an age discrimination class action, even though the class action had been filed on behalf of former employees who accepted the bank's early retirement program; employees may have left their jobs at different times via different procedural mechanism, but alleged unity of the bank's discriminatory scheme overwhelmed any differences.

The Defendants contend there is an absence of required administrative charge precluding piggybacking and certification. The Plaintiffs have previously mentioned the administrative charge of Janet E. Smith (Exhibit "W-4") and the administrative charge of William E. Hoover (Exhibit "W-1"). Both of these charges contain

language to sufficiently put the EEOC and the Defendants on notice and meets the requirements of *Grayson v. K-Ma*, 79 F.3rd 1086 (11th Circuit 1996). The *Grayson* court stated, that to serve as a basis for an ADEA class action, the underlying EEOC charge must contain allegations of class-wide discrimination. The court held that the underlying EEOC charge in *Grayson* adequately put the EEOC and the defendant on notice. The underlying charge stated "Within the last year, at least fifteen other store managers, all over the age of 40, have been demoted." Another underlying charge stated "Other older store managers have been demoted." Certainly if these underlying charges in *Grayson* met the test providing notice to the EEOC and the Defendant, then the charges filed in this case by Janet Smith and William Hoover, would meet the test. See, *Ingels v. Thiokol Corp.*, 42 F.3rd 616, 625 (6th Circuit 1994) where the court stated that in appropriate circumstances, however, most courts permit similarly situated individuals to join the action of a plaintiff even though the individual has not filed his or her own EEOC charge, so long as at least one plaintiff has complied with the filing requirement of §626(d). *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-94 (10th Circuit 1980). This is commonly referred to as the "single filing" rule. See also, *Hipp v. Liberty National Life Insurance Company*, 973 F.Supp. 1033 (M.D. Fla. 1997).

CONCLUSION

The plaintiffs have submitted in this response to the Defendant's Motion to Decertify substantial evidence of a single policy which discriminated against the Plaintiffs as

a class in violation of the ADEA. The Defendant's motion should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a conformed copy of the foregoing has been furnished to NANCY F. REYNOLDS and J. LEWIS SAPP, ESQ., Elarbee, Thompson & Trapnell, 800 Peachtree-Cain Tower, 229 Peachtree Street, N.E., Atlanta, GA 30303; RODNEY GADDY, ESQ., P.O. Box 14042, St. Petersburg, FL 14042; GARY SASSO, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., One Progress Plaza, Barnett Tower, Suite 2300, 200 Central Avenue, St. Petersburg, FL 33701-4352; HOWARD J. SHIFKE, ESQ., First of American Plaza, 201 E. Kennedy Blvd. Suite 1520, Tampa FL 33602, and to JOHN GALLAGHER, 8011 Ainsdale, Lane, Chesterfield, VA 23832 on this 7th day of October, 1998.

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 99-90033-I

[United States District Court for the Middle District of Florida]
Case No. 95-123-CIV-OC-10A

WANDA L. ADAMS, *et al.*,

Plaintiffs/Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WANDA L. ADAMS, *et al.*, Plaintiffs/Petitioners, v. FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION, Defendants.	Case No. 99-90033-I

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Defendants Florida Power Corporation and Florida Progress Corporation, through their undersigned counsel, certify that the following persons and entities have an interest in the outcome of this case:

Wanda Adams

James Akin

Awayland Coal Company, Inc.

Linda Baldwin

Willis Barnes

Elaine Barnes-Foster

Phillip Bassa

Larry Bayes

Patsy Baynard

James Beck

Cheryl Becker

Gary Becker

Cynthia Behrens-Boga

Earl Bettis

Richard Boreman

Boston Capital Corporate Tax Credit Fund VII

Boston Capital Corporate Tax Credit Fund VIII

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Florida Power Corporation Energy Solutions, Inc.

Florida Progress Corporation

Florida Progress Funding Corporation

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Mesa Hydrocarbons, Inc.

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Adolfo Paz

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Mark Peterson

PIH, Inc.

Andre Poulard

Powell Mountain, Inc.

Progress Capital Holdings, Inc.

Progress-Centrus, Inc.

Progress Energy Corporation

Progress Holdings, Inc.

Progress Land Corporation

Progress Materials, Inc.

Progress Metal Reclamation Company

Progress Provisional Holdings, Inc.

Progress Rail Services Corporation

Progress Reinsurance Company, Ltd.

Progress Telecommunications Corporation

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DEFENDANTS' OPPOSITION TO PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL

This is an age discrimination lawsuit arising out of a series of layoffs and reorganizations at Florida Power Corporation between 1992 and 1996. By Order dated August 26, 1999, the District Court granted Defendants' Motion to Decertify the Plaintiffs' class.[1] In so ruling, the Court held that (1) the class should be decertified as to any disparate treatment age claim because the Plaintiffs' claims are "dissimilar because they worked in widely dispersed geographic areas and work units within the

[1] For the purposes of this Opposition, "Plaintiffs" will refer to "Petitioners" and vice versa.

Defendants' business and industrial operations; they held a wide variety of job classifications; were managed and supervised by different people; and were terminated at different times by different decision makers based on different considerations or criteria," August 26, 1999 Order on Pending Motions ("Order"), p. 4, and (2) the disparate impact theory does not apply in ADEA cases and, therefore, cannot provide the basis for a class claim in this case.

The District Court has now certified for interlocutory appeal the second part of this ruling, that is whether the Court properly decertified Plaintiffs' class on the ground that the disparate impact theory does not apply in ADEA cases. However, because Plaintiffs could not meet their burden under 29 U.S.C. § 216(b) of establishing that they are "similarly situated" even if the disparate impact theory were available, the issue as to the theory's availability in a disparate impact case is not a controlling legal issue that will materially advance the ultimate termination of this litigation and, therefore, is not a issue warranting interlocutory appeal. Specifically, the same facts and circumstances that led the District Court to conclude that class treatment of the disparate treatment claim was inappropriate dictate the conclusion that class treatment of a disparate impact claim is inappropriate in this case. Even if the disparate impact theory were available in age discrimination cases, Plaintiffs could not satisfy their burden of proving that they were "similarly situated." As the District Court held in ruling on the disparate treatment issue, there was no one common employment action or selection procedure that resulted in the termination of all

of the putative class members. The individual issues in the case would therefore still predominate over any perceived common issue. And the case would still not be manageable as a class action – particularly since the individual disparate treatment claims of the 55 named Plaintiffs must still be litigated. Indeed, because the individual disparate treatment claims of the 55 named Plaintiffs remain and must be litigated, and interlocutory appeal will not materially advance the ultimate termination of this litigation. Accordingly, interlocutory appeal in this case is not appropriate.

BACKGROUND AND PROCEDURAL HISTORY

A. Beginning in 1992, Florida Power Corporation underwent a number of different reductions in force and reorganizations

Florida Power Corporation is an electric utility whose service area encompasses approximately 20,000 square miles in 32 Florida counties. During the years in question, Florida Power staffed and maintained its General Office Complex; between 40 and 50 district or division offices, each in a different geographical location; a nuclear unit in Crystal River; 17 fossil steam plants at six different locations; and 44 peaking units at 11 different geographical sites. Scardino Dec. ¶ 4, Exhibit a to Defendants' Motion for Decertification, attached hereto as Exhibit 1.

There was no one reduction in force at Florida Power Corporation. Rather, between 1992 and 1996, the various divisions and locations and their respective decision-makers decided what changes, if any, were needed within

that unit or division and decided how to implement those changes. There was no common selection procedure that resulted in the terminations of the 55 named Plaintiffs and 61 putative opt-ins. Rather, the Plaintiffs "worked in widely dispersed geographic areas and work units within the Defendants' business and industrial operations; they held a wide variety of job classifications; were managed and supervised by different people; and were terminated at different times by different decision makers based on different considerations or criteria." Order, p. 4. As David Miller, former Senior Vice President, Corporate Services, stated in his Declaration submitted in support of Defendants' Motion for Decertification, Exhibit C, attached hereto as Exhibit 2, "[w]hile various departments were individually deciding upon reorganizations, cutbacks, and the like, no standard method was utilized throughout FPC to determine which positions would be affected and/or eliminated or which employees would be separated." Miller dec. ¶ 15. And, as John Scardino, Vice President and Controller, stated, "[t]he reduction in personnel resulted from a number of different factors, including reorganizations; the elimination of processes, departments and operations; plant closings; and restructurings. Each department formulated and implemented its own selection process for determining who would be affected." Scardino Dec. ¶6.

B. Lawsuit filed more than four years ago

This lawsuit was filed on July 5, 1995, by fifteen former employees of Florida Power Corporation, who

alleged disparate treatment age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Florida Civil Rights Act, Fla. Stat. § 760.01, *et seq.* The complaint included class allegations. Two additional Plaintiffs were added with the first amended complaint, filed on October 13, 1995.

Plaintiffs first alleged a disparate impact age claim in their Second Amended Complaint. Defendants opposed the addition of the disparate impact claim on two grounds: (1) that the disparate impact theory is not available in ADEA cases and (2) that not one of the Plaintiffs had included a disparate impact claim in his or her EEOC charge and, therefore, the administrative exhaustion conditions precedent to filing such a claim had not been satisfied. Without addressing either of these points, by Order dated March 12, 1996, the Court granted Plaintiffs leave to file the second amended complaint.

On July 31, 1996, Plaintiffs filed a motion for leave to file a Third Amended Complaint, to add 35 more named Plaintiffs. Before the District Court ruled on this motion, on August 12, 1996, Plaintiffs filed a Motion to File a Fourth Amended Complaint and then on September 27, 1996, they filed a motion for leave to file a Fifth Amended Complaint, to add a total of 39 additional Plaintiffs.

On December 11, 1996, by agreement of the parties, the Court conditionally certified a class. Following a class notice period, on August 27, 1997, Plaintiffs filed a Motion to File a Sixth Amended Complaint, to add, as named Plaintiffs, the 39 Plaintiffs identified in the proposed Fifth Amended Complaint plus the 61 individuals

who had submitted opt-in notices during the class notice period. On June 19, 1998, the District Court granted this motion as to the 39 Amendment Plaintiffs but denied it as to the 61 opt-ins, stating that the Court would consider the claims of the 61 opt-ins only as class members.

In the meantime, on June 6, 1997, the 39 Amendment Plaintiffs and 61 opt-ins filed a separate class action lawsuit against the same Defendants in the same Court, which was captioned *Akin v. Florida Power Corp., et al.*, Civil Action No. 97-173-Civ-OC. By Order dated June 19, 1998, the District Court put the *Akin* litigation in abatement. The stay of the *Akin* litigation remains in effect.

On August 7, 1998, Defendants filed their Motion to Decertify in this case. The District Court granted Defendants' motion by Order dated August 26, 1999. As noted above, the District Court concluded that the Plaintiffs are not similarly situated for purposes of a disparate treatment claim because the "individual characteristic of the claim of each Plaintiff predominates over any remaining common features of the claims." Order, p. 7. The District Court further concluded that the disparate impact theory is not available in ADEA cases and, therefore, it could not provide the basis for continued class certification.

On October 27, 1999, after receiving briefing from the parties on the propriety of an interlocutory appeal, the District Court certified for interlocutory appeal its August 26, 1999 Order decertifying the Plaintiffs' class based on the legal conclusion that the disparate impact theory does not apply in ADEA cases. Plaintiffs filed the

instant Petition for Permission to Appeal on November 8, 1999.[2]

ARGUMENT

I. INTERLOCUTORY APPEALS ARE RARELY PERMITTED AND ARE PROPER ONLY WHERE THERE IS A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THE IMMEDIATE APPELLATE RESOLUTION OF WHICH WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

Interlocutory appeals are rare and are only permitted in exceptional circumstances. *See, e.g., Armstrong v. Martin Marieta Corp.*, 138 F.3d 1374, 1387 (11th Cir.), *cert. denied*, 119 S. Ct. 545 (1998) ("[A]ppellate review of class certification decisions under § 1292(b) is and will be rare."); *Flor v. BOT Fin. Corp.*, 79 F.3d 281, 284 (2d Cir. 1996) (use

[2] The Petition for Permission to Appeal which Plaintiffs filed with the Court on November 8, 1999 differs from the Petition for Permission to Appeal which Plaintiffs served on Defendants. Specifically, the Petition for Appeal which Plaintiffs filed with the Court contains no Certificate of Service and every page of the Petition is numbered "1". The petition served on Defendants has a Certificate of Service dated November 11, 1999, although Defendants received it on November 9, 1999, and the pages of the Petition are numbered consecutively, with page 9 being the first page of the Petition. For the purposes of this Opposition, in order to facilitate citation to Plaintiffs' Petition, Defendants will consider the first page of the Petition page 1, the second page of the Petition page 2, and so on.

of 1292(b) "should be strictly limited because 'only exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.' "); *Sussman v. Salem, Saxon & Nielson, P.A.*, 826 F. Supp. 1416, 1418 (M.D. Fla. 1993) (1292(b) "is designed to be used sparingly and only in exceptional cases."); *Farley v. Magnum*, No. 89-0725-CV-Hoeveler, 1995 U.S. Dist. LEXIS 20397, at *8 (S.D. Fla. June 9, 1995) (interlocutory appeals under 1292(b) require a showing of "exceptional circumstances" and should be "sparingly applied."), attached hereto as Exhibit 3.

Interlocutory appeals are particularly disfavored where reversal will not substantially alter the course of district court proceedings, the parties will not be relieved of any significant burden by reversal, or the appeal will only delay the ultimate resolution of the case. *See., e.g., Sussman*, 826 F. Supp. at 1418 (interlocutory appeal proper only where "speedy appeal would avoid protracted litigation."); *Global Access Ltd. v. AT&T Corp.*, 987 F. Supp. 1459, 1463 (S.D. Fla. 1997) (defendant "failed to overcome the strong presumption against interlocutory appeals as enunciated by the Eleventh Circuit Court of Appeals" where "given the already long history of the case, such additional time would unduly delay the trial"); *In re Slater Corp.*, No. 95-7118-Civ-Aronovitz, 1996 U.S. Dist. LEXIS 17185, at *7-8 (S.D. Fla. October 28, 1996) (where "immediate appeal will cause the parties to litigate the issue . . . in two different forums," appeal is improper), attached hereto as Exhibit 4.

Rather, under 28 U.S.C. § 1291(b), appeal of an interlocutory order is permitted only where the order "involves a controlling question of law as to which there

is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). *See Ray v. Edwards*, 725 F.2d 655 (11th Cir. 1984). The District Court's ruling that the Plaintiffs' class should be decertified because the disparate impact theory is unavailable in ADEA cases fails on each prong of this standard. Consequently, this Court should deny Plaintiffs' Petition for Permission to Appeal.

II. THE DISTRICT COURT'S AUGUST 26, 1999 RULING THAT THE DISPARATE IMPACT THEORY IS NOT APPLICABLE TO ADEA CLAIMS IS NOT A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THE IMMEDIATE APPEAL OF WHICH WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION

In the context of this particular litigation, the District Court's ruling that the disparate impact theory is not available in ADEA cases does not satisfy the standards for interlocutory appeal. First, it is not a controlling question of law in this case. Even if ADEA disparate impact claims could be brought, certification of the putative class would still not be appropriate in this case because Plaintiffs could not satisfy the "similarly situated" standard required to obtain class certification in an ADEA action. As the District Court held, there was no common employment practice or selection procedure that resulted in the termination of all of the Plaintiffs and the putative optins; individual questions would still predominate over

perceived common questions; and, a class case would still not be manageable (since, for instance, the individual disparate treatment claims of the 55 named Plaintiffs would still have to be litigated along with any such disparate impact claim). Second, because the individual disparate treatment claims of the 55 named Plaintiffs in the *Adams* case will remain and have to be litigated regardless of whether the Court affirms or reverses the District Court's ruling, an interlocutory appeal will not advance the ultimate termination of this litigation in any way whatsoever; rather, it will simply delay it, causing undue prejudice to both parties.

A. The District Court's Ruling Is Not a Controlling Issue of Law in This Litigation Because Plaintiffs Could Not Satisfy the "Similarly Situated" Standard Even if the Disparate Impact Theory Were Available.

A question of law is not controlling "if the litigation would be conducted in the same way no matter how it were decided." Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 16 Federal Practice and Procedure, Jurisdiction 2d § 3930, at 424 (1996). It follows that, if there is an alternate factual or legal basis upon which the court may reach the same result, there is no controlling issue warranting interlocutory appeal. *See, e.g., Ray v. Edwards*, 725 F.2d at 658 (where there is a "factual issue such that the district court would not need to rule on . . . the broader legal standard," interlocutory appeal as to what that standard should be is inappropriate); *Lerner v. Atlantic Richfield*, 690 F.2d 203, 211 (Temp. Emer. App. Ct. 1982) (rejection of one theory is not controlling

when another theory remains available that may support the same result) In this case, the issue of whether disparate impact claims are available in ADEA cases is not controlling of the District Court's decertification ruling because, for the same reasons that the District Court ruled that Plaintiffs cannot bring an ADEA collective action under a disparate treatment theory – because the Plaintiffs are not "similarly situated" – Plaintiffs cannot maintain an ADEA collective action under a disparate impact theory. *See Graves v. C&S Nat'l Bank of Georgia*, 491 F. Supp. 280, 282 (D.S.C. 1980) (where the legal issue sought for appeal was "not determinative of the present case," appeal under § 1292(b) was not proper).

Under 29 U.S.C. § 216(b), to obtain class certification in an ADEA action, the Plaintiffs must show that the proposed class members are "similarly situated." *See also Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). In assessing whether class members are "similarly situated," courts typically focus on three factors – namely: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available [to defendants] which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Brooks v. BellSouth Telecomms., Inc.*, 164 F.R.D. 561, 568 (N.D. Ala. 1995), *aff'd without op.*, 114 F.3d 1202 (11th Cir. 1997). Thus, courts routinely reject proposed collective actions where the "opt-in plaintiffs performed different jobs at different geographic locations and were subject to different job actions . . . which occurred at various times as a result of various decisions by different supervisors made on a decentralized employee-by-employee basis." *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 465 (D.N.J. 1988)

("*Lusardi II*"). *See also Brooks*, 164 F.R.D. at 569 (accord); *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130, 131 (D. Minn. 1991) (accord). Courts have also routinely refused to permit collective actions where there are a "variety of particular, differing, and sometimes unique defenses available to [the defendant] in contesting the varied and disparate claims of the [proposed collective group]." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1215 (5th Cir. 1995). *See also Brooks*, 164 F.R.D. at 569; *EEOC v. MCI Int'l., Inc.*, 829 F. Supp. 1438, 1446 (D.N.J. 1993); *Lusardi II*, 122 F.R.D. at 466. And, courts have recognized that "[t]he ADEA permits class actions only where employees are similarly situated in order that a defendant be afforded an opportunity to effectively defend. Requiring less would . . . amount to a deprivation of a property right in violation of the Due Process Clause . . . " *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372 (D.N.J. 1987) ("*Lusardi I*").

Where a case cannot reasonably be managed as a collective action and will only result in jury confusion, certification would deprive the Defendants of Due Process and hence be inappropriate. *Thiessen v. General Electric Capital Corp.*, 13 F. Supp.2d 1131, 1143 (D. Kan. 1998); *Lusardi I*, 118 F.R.D. at 372. Indeed, even where there is evidence of a policy or pattern of discrimination, courts have decertified class actions where there are significant disparities in the factual circumstances involving each class member and numerous individualized defenses. *See, e.g., Lusardi I*, 118 F.R.D. at 376 n. 41 (statistical evidence supporting a claim of age discrimination does not address the similarly situated requirement where causation will still have to be shown as to each of the plaintiffs

and defendant will have available to it numerous individualized defenses).

The District Court itself recognized and applied these standards in holding that this case could not be certified with respect to a disparate treatment claim. The Court concluded that "the named Plaintiffs in this action are not 'similarly situated' in relation to the other members of the putative class." Order, p.6. Specifically, the Court recognized that the "individual features of each claim predominate over the common ones," Order, p. 6; that Defendants will necessarily present a myriad of individualized defenses; and that each claim will require an individualized inquiry, effectively rendering a collective action unmanageable. These same factors also preclude certification under a disparate impact theory.

1. No common selection procedure

First, Plaintiffs cannot establish that there was a common selection procedure that resulted in the terminations of all of the putative class members. Yet, to pursue a disparate impact class claim, Plaintiffs would need to be able to identify a specific employment practice that adversely affected *all* of the proposed class members. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) ("a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."). If different employment practices or selection procedures governed their respective layoffs, then Plaintiffs are not "similarly situated" and no class may be certified. *See e.g., Lusardi II*, 122 F.R.D. at 466; *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238-239 (W.D. Texas 1999) (refusing to certify a class for a Title VII disparate impact claim of race discrimination in promotions because there was no common selection procedure for promotions).

As the District Court has already recognized, there was no common selection procedure that resulted in the terminations of the 55 named Plaintiffs and 61 opt-ins: rather, the Plaintiffs "worked in widely dispersed geographic areas and work units within the Defendants' business and industrial operations; they held a wide variety of job classifications; were managed and supervised by different people; and were terminated at different times by different decision makers based on different considerations or criteria." Order, p. 4. The same record evidence upon which the Court relied to decertify the proposed disparate treatment class – the evidence of different actions being taken by different people, at different times, in different departments, different reasons, and using different selection procedures, *see* pp. 3-4 *supra*, – dictate the decertification of a proposed disparate impact class in this case, even if disparate impact claims were available under the ADEA.[3]

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[3] Defendants are not arguing at this time, as the District Court suggested they were, that none of the Plaintiffs could ever prove an individual disparate impact case. Rather, Defendants submit that Plaintiffs cannot establish that they are "similarly situated" for purposes of a wide-class disparate impact claim and that, therefore, the legal issue of whether disparate impact claims are available under ADEA cases is not controlling on whether the District Court properly decertified the Plaintiffs' class.

2. Individualized issues and defenses predominate.

Second, as the District Court also already implicitly recognized, Plaintiffs' claims are subject to a multitude of individualized defenses – even if they are allowed to proceed on a disparate impact theory. For instance, for each of the 55 named Plaintiffs' disparate treatment claims, Defendants will present evidence of distinct legitimate, nondiscriminatory reasons for the employment actions. Thus, regardless of whether disparate impact is a viable theory under the ADEA, because the disparate treatment claims remain, individual issues predominate over any perceived common ones.

In addition, as to both treatment and impact claims, Defendants would still be entitled to present individualized defenses such as the lack of causation, the failure to file an administrative charge, and the statute of limitations. For instance, Defendants would still be entitled to show that the identified specific practice did not cause the termination of individual Plaintiffs – that is that there were other causes. *See, e.g., Edwards v. Wallace Community College*, 49 F.3d 1517, 1520 (11th Cir. 1995) (affirming summary judgment on disparate impact claim in race discrimination case where plaintiff failed to identify an employment practice that "led to a discriminatory impact on African-Americans and, more specifically, that affected her.").

Here, the record is replete with evidence that demonstrates the individualized nature of the decision-making process. *See* pp. 3-4, *supra*, And, of course, as the District Court noted in its August 26, 1999 Order, p. 4, if any of

the Plaintiffs were to prevail, the case of "each will vary according to the selection of an individual remedy – the calculation of damages, including resolution of issues of mitigation, or the appropriateness of equitable relief including the possibility of reinstatement." *See, e.g., Zapata v. IBP, Inc.*, 167 F.R.D. 147, 166 (D. Kan. 1996) (denying plaintiffs' motion to certify class where "[p]laintiffs' claims are highly individualistic, inasmuch as the precise relief which this court would grant to each successful plaintiff depends upon a number of factors and characteristics specific to each particular plaintiff" such that "individual damages determinations predominate over common issues."). In sum, because of the myriad of individualized facts and defenses, a class action would not be appropriate in this case even with a disparate impact claim.

3. Existence of individual disparate treatment claims, as well as individualized defenses to any disparate impact claim, renders case unmanageable as a collective action

Finally, this case is not manageable as a class action, even if the disparate impact theory were available. Accordingly, Plaintiffs cannot satisfy the "similarly situated" standard of 29 U.S.C. § 216(b). Under § 216(b), Plaintiffs must show that the case can be manageably and fairly tried as a class action. *See Mooney v. Aramco*, 54 F.3d at 1215-1216 (affirming district court's conclusion that fairness and procedural consideration dictated decertification); *Thiessen v. General Electric Capital Corp.*, 13 F. Supp.2d at 1143 (plaintiffs' proposed trial management plan reinforced the court's decision to decertify where, in

the end, the only viable and appropriate solution would be single-plaintiff trials, thereby defeating one of the benefits of proceeding as a collective action); *Bayles v. American Med. Response of Colorado*, 950 F. Supp. 1053, 1067 (D. Colo. 1996) (decertifying collective action in FLSA context, court stated "given the number of individual issues that must be resolved, I am not persuaded that a single trial would save significant time or effort.").

To proceed with a collective action with the individualized defenses and circumstances surrounding the claims of each of the 55 named Plaintiffs and the 61 optins, plus the defenses and circumstances surrounding the individual disparate treatment claims of each of the 55 named Plaintiffs, would defeat the purposes of a collective action – namely, the efficient resolution of common issues. Rather, here, a collective action would lead to extraordinary jury confusion and would deny Defendants the opportunity to effectively defend; and, because of the overlap in issues of fact between Plaintiffs' disparate treatment age claims and any disparate impact age claim, separate proceedings on these claims would run afoul of the Seventh Amendment. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422-425 (5th Cir. 1998) (Seventh Amendment concerns precluded partial certification of race discrimination action on disparate impact claim). In sum, the widely disparate nature of the putative class and the highly individualized nature of the defenses would make this case entirely unmanageable as a collective action and warrants decertification.

In short, even if the disparate impact theory were available in ADEA cases, the District Court would, in any event, be required to decertify the putative class because

its supposed members are not "similarly situated" within the meaning of 29 U.S.C. § 216(b). Therefore, the legal issue of whether the disparate impact theory is available in ADEA cases is not a controlling issue of law that is properly subject to immediate interlocutory appeal.[4]

B. An Immediate Appeal from the District Court's Ruling Will Not Materially Advance the Ultimate Termination of this Litigation

Since an interlocutory appeal will not materially advance the ultimate resolution of the litigation, it is unwarranted. Under the governing case law, if the parties

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[4] Moreover, because Plaintiffs have failed to meet the basic administrative prerequisites necessary to maintaining such a claim – namely filing an EEOC charge giving notice of the claim, an ADEA disparate impact claim would, in any event, fail. Accordingly, again, the legal issue of whether the disparate impact theory is available in ADEA cases, is not a controlling one in this case. Specifically, none of the Plaintiffs ever filed an EEOC charge giving notice of a disparate impact claim. The relatively few charges that were filed all raised claims of individual disparate treatment. Plaintiffs effectively conceded this fact when they argued in Plaintiffs' Response to the Court Order Entered February 5, 1996, Regarding Disparate Impact Claims in Filing with the EEOC, pp. 5-6, that some of the affidavits the Plaintiffs submitted to the EEOC provided notice of such claims. However, affidavits submitted to the EEOC are confidential while an investigation is pending and are not provided to the employer. They, therefore, cannot be cited as providing notice to an employer of a particular claim. *See, e.g., Kloos v. Carter-Day Co.*, 799 F.2d 397, 401 (8th Cir. 1986) (counsel's letter to EEOC did not constitute adequate notice of class since the EEOC did not transmit the letter to the employer.).

will be the same and many of the same issues will have to be litigated regardless of the disposition of the certified questions, certification is not appropriate. *See, e.g., Westwood Pharms., Inc. v. National Fuel Distrib. Corp.*, 964 F.2d 85, 88 (2d Cir. 1992) (even if one defense did not apply, where many of the same factual issues relevant to the defenses would still have to be litigated, interlocutory appeal is generally improper); *In re Slater Corp.*, No. 95-7118-Civ-Aronovitz, 1996 U.S. Dist. LEXIS 17185, at *7-8 (S.D. Fla. October 28, 1996) (where lower court would still be required to determine broader issue, interlocutory appeal on narrower issue would not advance ultimate termination of litigation); *Iowa State Univ. Research Found., Inc. v. Murata Machinery Ltd.*, 1993 U.S. App. LEXIS 14273, at *6 (Fed. Cir. March 22, 1993) (declining to accept appeal under 1292(b) because "whether or not we accept this appeal, the litigation between [the parties] will continue."), attached hereto as Exhibit 5; *Graves v. C&S National Bank of Georgia*, 491 F. Supp. 280, 282 (D.S.C. 1980) (interlocutory appeal not permitted where the disputed legal issue "does not end the litigation or otherwise determine the rights of the parties as a trial would still be required at some later date" and "an immediate appeal would result in postponing this trial and increase the time and costs of litigation."); *Arnold v. United Artists Theatre Circuit Inc.*, 158 F.R.D. 439, 466 (N.D. Cal. 1994) ("In view of the approximately two years of delay that would result from a § 1922(b) certification, it is clear that certification of an interlocutory appeal would slow rather than accelerate the ultimate termination of the litigation.").

In this case, for many of the same reasons already discussed, an interlocutory appeal will not materially advance the ultimate termination of the litigation. Many issues will remain to be litigated in any event. There are 55 named Plaintiffs remaining in this case, *i.e.*, the 17 original named Plaintiffs and the 38 amendment Plaintiffs. Their individual disparate treatment claims will remain regardless of the outcome of any appeal on the disparate impact class certification issue (that affects only the 61 opt-ins). An interlocutory appeal will not advance the litigation of these claims at all; rather it will delay their resolution, causing prejudice to both Defendants and Plaintiffs.

Moreover, as noted above, there are numerous factual and legal defenses to any disparate impact claim. For instance, as to each Plaintiff, there would be issues as to the basis for the individual termination decision: who made the decision, how the decision was made, and why the decision was made. Thus, again, an appeal will not advance the ultimate termination of the litigation.

Finally, this case has been pending for over four years. As both Plaintiffs and Defendants have realized while attempting to conduct discovery over the last year, Plaintiffs and witnesses are changing jobs and moving to other states and memories are continuing to fade, making it increasingly difficult for parties to schedule depositions and obtain meaningful discovery. Any further delay will simply make these problems more acute. For these reasons, this case does not satisfy the §1292(b) standard for interlocutory appeal.

CONCLUSION

For the foregoing reasons, the District Court's ruling that the Plaintiffs' class should be decertified because the disparate impact theory is unavailable in ADEA cases is not a controlling question of law as to which there is substantial ground for difference of opinion and the immediate appellate resolution of which will materially advance the ultimate termination of this litigation. Accordingly, Defendants respectfully request that this Court deny Plaintiffs' Petition for Permission to Appeal.

Respectfully submitted,

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[Certificate of Service Omitted In Printing]

EXHIBIT 1

[Declaration of John Scardino, Jr. Reprinted *supra*, at pages 31 to 32.]

EXHIBIT 2

[Declaration Of David L. Miller Reprinted *supra*, at pages 53 to 62.]

EXHIBIT 3

[*Farley v. Magnum Marine Corp.*, U.S. District Court, Southern District of Florida, No. 89-0725-CV-Hoeveker, June 9, 1995, Omitted In Printing.]

EXHIBIT 4

[*In re*: *Slater Corp.*, U.S. District Court, Southern District of Florida, No. 95-7118-CIV-ARONOVITZ, October 28, 1996, Omitted In Printing.]

EXHIBIT 5

[*Iowa State Univ. Research Found. v. Murata Machinery*, U.S. Court of Appeals, Federal Circuit, No. 365, March 22, 1993, Omitted In Printing.]

THE OLDER AMERICAN WORKER

AGE DISCRIMINATION IN EMPLOYMENT

REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964

JUNE 1965

LETTER OF TRANSMITTAL

WASHINGTON, D.C., *June 30, 1965.*

Hon. JOHN W. MCCORMACK,
Speaker of the House of Representatives.

Hon. HUBERT H. HUMPHREY,
The President of the Senate.

SIRS:

I have the honor to transmit to the Congress herewith the "study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination," with my recommendations on this subject, as required to be submitted by June 30, 1965, under Section 715 of the Civil Rights Act of 1964 (Public Law 88-352).

This report is based upon special studies conducted in response to this directive of the Congress and upon extensive research done earlier, including the work of the President's Council on Aging. The special studies conducted for this report are contained in a separate volume of research materials.

The report presents recommendations for dealing with arbitrary discrimination in employment because of

age and with the basic factors which impede the reemployment of displaced workers as they grow older. It also discusses measures which should be considered for the fuller use of the talents and time of older persons in private enterprise and in community service.

It is my sincere hope that the report will provide the impetus for effective measures in this most deserving and much neglected cause.

Sincerely,

/s/ W. Willard Wirtz
W. WILLARD WIRTZ,
Secretary of Labor

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I. Introduction

The poet Browning could write of growing old, and say of it: "The best is yet to be / The last of life, for which the first was made."

A century later, reality has still not caught up with that poetry. Although scientists and doctors have extended life with almost incredible ingenuity, and have eased some of the physical pains of old age, there has been no comparable invention regarding the uses of these long years of vigorous active life that now commence at the point where, until almost this generation, life began

rapidly to ebb. Yet, this is in truth a miracle, a new age of man; and it is hardly to be wondered that it has brought with it new problems as yet unsolved, indeed as yet hardly examined.

The Social Security Act of 1935 established an historic precedent; but security is no more than a foundation for satisfaction, and not itself enough. Subsequent legislation – various housing acts, parts of the antipoverty program, provisions to cover some of the costs of illness that comes with age – has recognized the right to grow old in decency. Yet decency, too, is meager reward.

Meeting the problems associated with advancing years remains, accordingly, a pressing piece of unfinished business for those who consider it not heresy, but the fullest reverence, to include the perfectibility of life within the human competence.

There is, in this connection, no harsher verdict in most man's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is "You're too old," that a man turns away, in another poet's phrase, finding "nothing to look backward to with pride, nothing to look forward to with hope." If that verdict is fair on the facts, it can only be viewed as part of life's bruising mystery. But if that verdict is unfair, or unnecessary, it is part of man's inhumanity to man that can be and must be stopped.

All of this is the context of the Congress' provision, in Section 715 of the Civil Rights Act of 1964, that –

> The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment

> because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.

This report is presented in response to this requirement.

The Congressional directive was carefully and precisely worded, avoiding prejudgment of the influence of discrimination on the employment of older workers, recognizing subtly that not all discrimination in this area is "arbitrary," asking a broad consideration of all "factors which might tend to result in discrimination" in employment because of age, and requesting a report on the consequences of these factors both on the economy and on the individuals affected. These guides have shaped this report.

The development of responsible and effective public policy regarding discrimination based on age requires as steadfast and unfearing confrontation of reality as did the development of a national policy opposed to discrimination based on race, color, religion, sex, or national origin. But there is an essential difference.

The Nation has faced the fact – rejecting inherited prejudice or contrary conviction – that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be

simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. This would be easy – and wrong.

The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving – for example – race. It means in connection with the age question, furthermore, several different things.

Employment discrimination because of race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned.

The most closely related kind of discrimination in the non-employment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*. It is this which Congress refers to, in Section 715 of the Civil Rights Act, as "arbitrary discrimination."

A third type of discrimination – which should perhaps be called something else entirely – involves decisions not to employ a person for a particular job because of his age *when there is in fact a relationship between his age and his ability to perform the job*. The only reason for marking out this third area is that it clearly does exist so far as the age question is concerned, but does not exist so far as, for example, racial or religious discrimination are concerned.

There is finally, so far as age is concerned, that kind of "discrimiantion" which results when an employer turns an older man or woman away, not because of concern about the individual's ability to perform the work, but because of programs and practices actually designed to *protect* the employment of older workers while they remain in the work force, and to provide support when they leave it or are ill. Seniority and promotion-from-within systems, and pension and insurance programs, are a mark of civilization. They vastly enhance the dignity, the security, the quality of the later years of life in the United States. At the same time, ironically, they sometimes have tended to push still further down the age at which employers begin asking whether or not a prospective employee is too old to be taken on.

With these distinctions between various kinds of "discrimination" in mind, it is important, next, to recognize that there are *two* sets of value judgments to be made regarding any particular kind of discrimination based on age.

The most obvious of these judgments must be made in terms of the justification for particular employment practices in relationship to the efficient operation of a particular enterprise and of the economic system as a whole. This includes the value to the system of making maximum use of the Nation's full manpower potential, of each individual's full capacity.

What is less obvious, indeed still unclear, is the extent to which account is properly taken of the value *to the individual* of opportunity which the most "efficient" operation of the system as a whole might not provide.

The prevailing assumption is that people are created for jobs, not jobs for people. The difference between a great and a lesser society – particularly one which prides itself on being individual-oriented rather than system-oriented – includes its readiness to review this traditional assumption. The point is clearest in the case of an older person whose economic value becomes marginal in traditional market place terms, but for whom employment is the difference between life's having meaning and no meaning. This is not just a matter of "human" concern for the individual. There may well be involved a choice for the rest of us between paying, as customers, a few cents an hour of that individual's wages (and getting the value of his productive potential) or, in the alternative, paying, as taxpayers, the full amount of his "welfare" upkeep (and getting nothing in return).

It is proper reminder, as part of a preface to policymaking regarding a question involving age, that while each of us is growing older as an individual we are growing younger (at least for the present) as a whole population.

It is true, on the one hand, that the absolute number of older persons – and therefore the number of persons who may be the victims of age discrimination in employment – is growing rapidly.

- ★ There are today 22 million men and women between the ages of 45 and 55, almost 17 million between the ages of 55 and 65, and 18 million 65 and over.
- ★ These numbers are all significantly greater, both in absolute terms and as a proportion of the

entire adult population, than was true ten years ago, or twenty, or fifty.

- ★ By 1975, there will be almost 94 million men and women between 45 and 55, about 20 million between 55 and 65, and about 21 million 65 and over.

Because young persons go to work later than they used to, and more and more older women are going back to work, the number of workers age 45 and over continues to grow; and older workers will still make up more than a third of the work force in the years ahead.

So the problem area is increasing significantly.

At the same time, however, the median age of the population in the United States is going down.

- ★ Half of us are today under 29.
- ★ By 1975, half of us will be under 26.

What this means is that a Nation which already worships the whole idea of youth must approach any problem involving older people with conscious realization of the special obligation a majority assumes with respect to "minority group" interests. This is, to be sure, one minority group in which we all seek, sometimes desperately, eventual membership. Discrimination against older workers remains, nevertheless, a problem which must be met by a majority who are not themselves adversely affected by it and may even be its temporary beneficiaries.

The "discrimination" older workers have most to fear, however, is not from any employer malice, or unthinking majority, but from the ruthless play of wholly

impersonal forces – most of them part of what is properly, if sometimes too casually, called "progress."

Over a sixth of the railroad engineers in the United States are 65 or older. But airline transport pilots must retire at 60. Astronauts are not hired after 35.

The same advancing science that is extending people's productive lives is contributing to putting lower age limits on employment.

This results partly, at least for the present, from the increase in educational requirements for many jobs, and from the fact that older workers today have less formal education, on the whole, than younger workers. Among male workers 45 to 54, nearly one-third of those who are white, and almost two-thirds of the nonwhite group, *have not gone beyond the eighth grade*. Among male workers 55 to 64, nearly half of the white group and more than three-quarters of the nonwhite group *have not gone beyond the eighth grade*. This is in sharp contrast to the education of young persons now entering the work force.

Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers – unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education.

In 1964, about 3½ million workers 45 years old or older were involuntarily unemployed at one time or another. As the number of older workers increases, the problem of their job readjustment and unemployment

will be compounded. The achievement of fuller employment opportunity in the economy as a whole will provide more jobs for older workers. At the same time, the pace of changing technology, changing jobs, changing educational requirements, and changing personnel practices increases the need for special efforts if older workers' employment prospects are to improve significantly.

The Findings which follow in this report identify the extent to which there is evidence of age "discrimination" of various kind, particularly "arbitrary" discrimination, as a factor in the unemployment of older workers.

The Conclusions and Recommendations suggest measures which can and should be taken to increase the economic and social well-being of the Nation and the satisfactions of life for millions of older American workers who will otherwise be the victims of discrimination in employment based on age.

II. Findings

These findings cover the two areas specified in section 715 of the Civil Rights Act of 1964:

> *Factors which might tend to result in discrimination in employment because of age.*
>
> *The consequences of such discrimination on the economy and individuals affected.*

In each case, the findings relate to the entire range of factors which tend to have adverse effects on the employment of older workers. Some of these factors involve what is properly identified as arbitrary discrimination. Others do not. Yet some of these other factors not only

have the same effect as arbitrary discrimination, but are equally susceptible to constructive action.

Factors Which Might Tend to Result in Discrimination in Employment Because of Age

Older workers are in general valued and often prized employees. Almost 97 percent of male workers 45 and over were employed in 1964. Persons over 45 make up almost 40 percent of the U.S. labor force, but only 27 percent of total unemployment, and only 17 percent of all the applicants registered at the public employment service offices. Most older workers who are not at retirement age do get reemployed when they lose jobs.

There is, nevertheless, clear evidence of the Nation's waste today of a wealth of human resources that could be contributed by hundreds of thousands of older workers, and of the needless denial to these workers of opportunity for that useful activity which constitutes much of life's meaning.

The central element identifiable in this situation is the fact of sluggish human adjustment and impersonal economic accommodation to the present rapid pace of scientific and technological progress.

These findings analyze the extent to which older workers are deprived of useful and profitable activity as a result of each of the four types of discrimination described in the Introduction to this report.

As has already been indicated in the Introduction, we find no significant evidence of the first kind of discrimination – that which is based on the kind of dislike or

intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job.

We do find substantial evidence of arbitrary practice in the second category of discrimination – discrimination based on unsupported general assumptions about the effect of age on ability – in hiring practices that take the form of specific age limits applied to older workers as a group.

We find that in the third category, which involves decisions made about aging and the ability to perform in individual cases, there may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances.

Individual circumstances may similarly lead to arbitrary discrimination in the fourth category that involving institutional arrangements which operate indirectly to restrict the employment of older workers.

A. Discrimination Arising from Dislike or Intolerance

Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of employment. There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment.

The process of aging is inescapable, affecting everyone who lives long enough. It is gradual, minimizing and

obscuring differences among people. At all times there are people of all ages living in close association rather than in separate and distinct social or economic environments. The element of intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers.

It is true that hiring officials are not immune to the brightness, vigor, and attraction of youth, nor always above exploiting these attributes for commercial advantage. But such choices involve preferences *for* one group, rather than antagonism *against* another.

We have found no evidence of prejudice based on dislike or intolerance of the older worker. The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages, rather than around the people as such. This issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work.

This is not to say that there is no intolerant prejudice against older persons as such. Determinations not to employ older workers can become deep-seated and even emotional in character. But were this the sole matter, the degree to which it exists would not warrant public concern.

B. Arbitrary Discrimination: Specific Age Limits

The most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications. These restrictive practices appear in announced employer policies (e.g., in Help Wanted advertisements; or in job orders filed with employment agencies) or in dealings with applicants when they appear in the hiring office.

It has become generally realized that these broad age-limit practices have developed to a point requiring public attention. Twenty States have passed statutory prohibitions of one form or another against them. But there has been no comprehensive study of their scope or effects, and the available information has been largely limited to two surveys (in 1956 and in 1963) of age restrictions placed by employers on job openings filed with local Employment Service offices.

A special study of age limitations in hiring has accordingly been made in connection with the preparation of this report. This study is based on a survey made by the Bureau of Employment Security of the Department of Labor, through the Federal-State Employment Service system. The study covers a sample of over 500 employers, employing half a million workers, in five cities (Baltimore, Indianapolis, Kansas City, Mo., Memphis, and Salt Lake City). These cities are all in States which did not, as of the time of the study (early 1965) have laws against age discrimination in employment. (Indiana has since adopted such a law.) The study includes both

employers who file job openings with the Employment Service and others who do not.

The fall study is contained in the volume of research materials which accompanies this report.

This 1965 study, along with other available data and information, permits the following findings.

1. *The setting of specific age limits beyond which an employer will not consider a worker for a vacant job, regardless of ability, has become a characteristic practice in those States which do not prohibit such action, to the extent and with the result that in these States:*

- *Over half of all employers are presently applying such limitations, using age limits typically set at from 45 to 55;*
- *Approximately half of all job openings which develop in the private economy each year are closed to applicants over 55 years of age, and a quarter of them are closed to applicants over 45.*

Almost three out of every five employers covered by the 1965 survey have in effect age limitations (most frequently between 45 and 55) on new hires which they apply without consideration of an applicant's other qualifications. Twenty-seven percent of the employers reported formal upper age specifications for some or all occupations. It was determined on investigation that an additional 30 percent follow such a policy in practice.

The results of this survey are consistent with those in the 1963 Employment Service survey of the job orders filed by employers with the Service in eight cities (Albuquerque, Baltimore, Houston, Indianapolis, Kansas City

(Mo.), Louisville, Memphis, Salt Lake City) in States having no laws prohibiting age discrimination. The 1963 survey revealed that about 30 percent of the job orders filed were limited to men and women under 45, and over 40 percent were limited to applicants under 55. A similar study in 1956 in seven other cities had shown even higher percentages of job orders with age restrictions: 40 percent fixed age 45 as an upper limit, and over 50 percent fixed age 55 as the limit.

2. *The establishing by employers of stated age limitations (or, on the other hand, of stated policies against any age limitations) has a direct and marked effect upon the actual employment of older workers, with the result that:*

- *The proportion of older workers hired by firms with stated upper age limits is half the proportion of older workers hired by firms with stated policies of ruling out age limits.*
- *The proportion of older workers hired by firms with no stated policy regarding age limitations is significantly smaller than the proportion of older workers hired by firms with stated policies of ruling out age limits, especially with respect to workers 55 and over.*

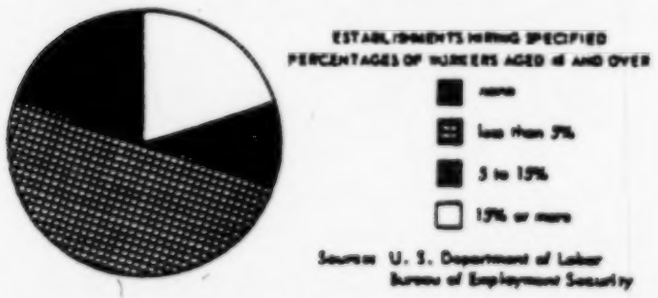
The 1965 survey shows the following:

Age of older hires	*Older hires as percent of total hires in firms having –*		
	Upper age limits	*No policy on age*	*No age limits*
Total, 45 years and over.	6.9	8.6	13.0

45 to 54 years...	4.7	6.5	9.5
55 to 64 years...	1.9	1.8	3.3
65 years and over	.3	.3	.2

A very small proportion of new employees hired today are 45 or older. One-fifth of the employers surveyed hired no older workers at all. (See chart 1.) These facts in themselves indicate, of course, nothing about discrimination.

Chart 1. OLDER WORKERS REPRESENT LESS THAN 5 PERCENT OF NEW HIRES IN MOST ESTABLISHMENTS[1]



[1] Based on Special Survey of Hiring Practices in 5 Cities in 1965

The state of labor supply and demand obviously has an important influence on employer hiring policies. Restrictions tend to be eliminated, eased, or waived when the employer cannot recruit under rigid specifications. The 1965 survey, like earlier surveys, shows somewhat fewer restrictions (i) in skilled occupations, the traditional crafts, and the professional and semiprofessional positions, where there are widespread shortages, and (ii) in the expanding but traditionally lower paid retail sales

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and service occupations. Age limitations are most frequent for clerical positions and for semiskilled and unskilled work, and for "outside" salesmen. Similarly, the manufacturing industries, with the notable exception of apparel, are hiring relatively few people over 45. Retail stores, hotels, personal and medical service industries, and government agencies are generally hiring older workers in substantially larger proportions.

It is reasonable to expect that present age restrictions would be eased to some extent under conditions of fuller employment. This has happened in the past, particularly in periods of national emergency. There is no current indication, however, of any general or significant relaxation of present age restrictions in hiring on the basis of prospective overall economic developments alone.

The prospect is, rather, that the continuation of age limitations will have a substantial adverse effect upon the employment opportunities of older workers.

3. *An unmeasured but significant proportion of the age limitations presently in effect are arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.*

Conclusive determination of the extent to which age restrictions are arbitrary would necessitate detailed examination of the reasons for the limitations in individual cases, under carefully established procedures including, almost necessarily, some form of hearing process. No such proceedings were envisaged in Section 715 of the Civil Rights Act, and none have been instituted.

It is apparent, however, from evidence obtained during the course of this study, that a great many age limitation policies are based in fact on considerations quite different from those offered as (and undoubtedly believed to be in many cases) their explanation.

The explanations given by employers for the adoption of age limitations include (as reflected in the 1965 study) a variety of factors:

- Physical capability.
- A policy of promotion-from-within and accompanying restriction of hiring to younger ages and entry jobs.
- Ability to hire younger workers for less money, and concern that older workers' earnings expectations are "too high."
- Pension plans (costs and provisions), and to a much lesser extent, costs of health and life insurance.
- Lack of skills, experience, or educational requirements.
- Limited work expectancy.
- Training costs and low productivity.
- Lack of adaptability and undesirable personal characteristics.
- Desired age balance in the work force.

Physical capability is by far the most prominent single reason advanced for imposing upper age limits.

There are unquestionably *some* jobs involving physical demands so unusual that it represents not only good

business sense but common decency not to assign them to workers whose age increases the *possibility* of some weakening of body tissue.

It is relevant, however, in determining the true basis for these age limitations which are explained in terms of physical demands of the work

- That in 70 percent of the cases of claimed basing of age limits on physical capabilities reported in the 1965 survey, no studied basis for this conclusion was reported;
- That there is a vast difference between various employers' ideas concerning the age at which physical demands should exclude workers from jobs involving similar duties – so that in the 1965 survey physical requirements were reported to account for restrictions as low as 25 years of age and as high as 60 for groups of occupations involving comparable physical exertions and demands for strength;
- That a great many responsible employers do hire older workers for jobs other employers bar them from on the basis that their age alone disproves their capability.

The very generality of many of the age limitations indicates their character. They exclude *all* potential new employees above a certain age, without any differentiation among the various jobs which may be involved and with no provision for determination of whether particular applicants might be qualified despite their age.

Further illumination comes from the responses which employees using age limitations made to an inquiry

included in the 1965 Employment Service survey concerning the circumstances under which these restrictions might be waived. Labor supply conditions outweigh any other considerations. Many employers using age restrictions indicate a willingness to hire "over-age" workers if they cannot get younger workers, but will not consider them on their merits if the jobs can be filed with younger workers. Some state that older workers would only be hired if their abilities *exceeded* those of younger workers.

The various studies show that upper age limits set on a company wide basis are generally lower than those set for specific jobs. The higher the skill level, and the greater the demand for workers, the higher the age limit; age limits for professional, managerial, and skilled workers are typically set at 50 or higher; for service workers also at 50 or above; for clerical workers and salesmen below 50; and for semiskilled and unskilled below 45. A clear reflection of job market judgment is apparent in the setting of these ages.

4. *The competence and work performance of older workers are, by any general measures, at least equal to those of younger workers.*

The Bureau of Business Management at the University of Illinois in a study of supervisory ratings in manufacturing establishments in 1954 found that 11 percent of the workers 60 years old and over received excellent ratings for overall performance; only 3 percent received poor ratings. On work quality, 32 percent were rated better than young workers, 60 percent the same and 8 percent poorer.

A 1959 Canadian study of sales persons in retailing showed that workers hired above the age of 40 attained higher performance ratings in a shorter period than workers hired below 30 years of age. They reached their peak performance in their fifties.

Department of Labor studies of factory production work involving physical effort indicate that a slight decrease in productivity occurs after age 45; but that the decrease does not become substantial until age 60. In office or other sedentary work little, if any, decline occurs prior to age 60, and the subsequent decline is minor.

So far as the allegedly key issue of physical capability is concerned, a comprehensive review of available medical and psychological evidences reveals no support for the broad age lines which have been drawn on the basis of claimed physical requirements. To the contrary. The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age.

The most extensive series of recent studies are those reported by A. T. Welford in 1958 on the basis of the Nuffield Foundation's basic work on aging and human skill, covering the post war period. These studies attribute most of the deterioration of ability to changes in the central nervous system, and indicate that these changes do not affect occupational skills in any significant numbers of cases before age 60.

The Nuffield Foundation studies do point to increasing differences of individual performance with advance in age. They show, however, at the same time, an increasing capacity of the human system to compensate for

diminishing abilities, and a wide range of occupational requirements which falls well below the usual range of personal capacities subject to these requirements. The scientific findings, if they were to be translated into hiring policies, would clearly rule out policies based on rigid age limits.

One of the higher hiring rates for older clerical workers found during the course of the 1965 study is in the postal service, where appointments are made, under Civil Service regulations, without regard to age. Although postal clerks are engaged in some of the most physically demanding of the clerical occupations, a study made by the Bureau of Labor Statistics of the relative performance of Federal mail sorters in 1963 showed an equal performance level for the older workers.

Here again, the strongest indication of the lack of real basis for most age limitations is the demonstrated willingness of so many American employers to consider older workers on their merits as individuals and to hire them. Although one out of every five of the employers included in the 1965 Employment Service survey hired no new employees among applicants over 45 years of age, another one-fifth hired at least 15 percent in this age group. Many of these firms reported an active policy of recruiting older persons, and praised them for performance and dependability.

It is significant that employers and supervisors often rate their own older workers high on over-all performance, but are at the same time reluctant to hire new employees in the same age brackets.

5. *Arbitrary age discrimination is significantly reduced in States which have strong laws, actively administered, directed against discrimination based on age.*

There are today twenty States which have adopted statutes prohibiting discrimination in employment on the basis of age. (See chart 2.)

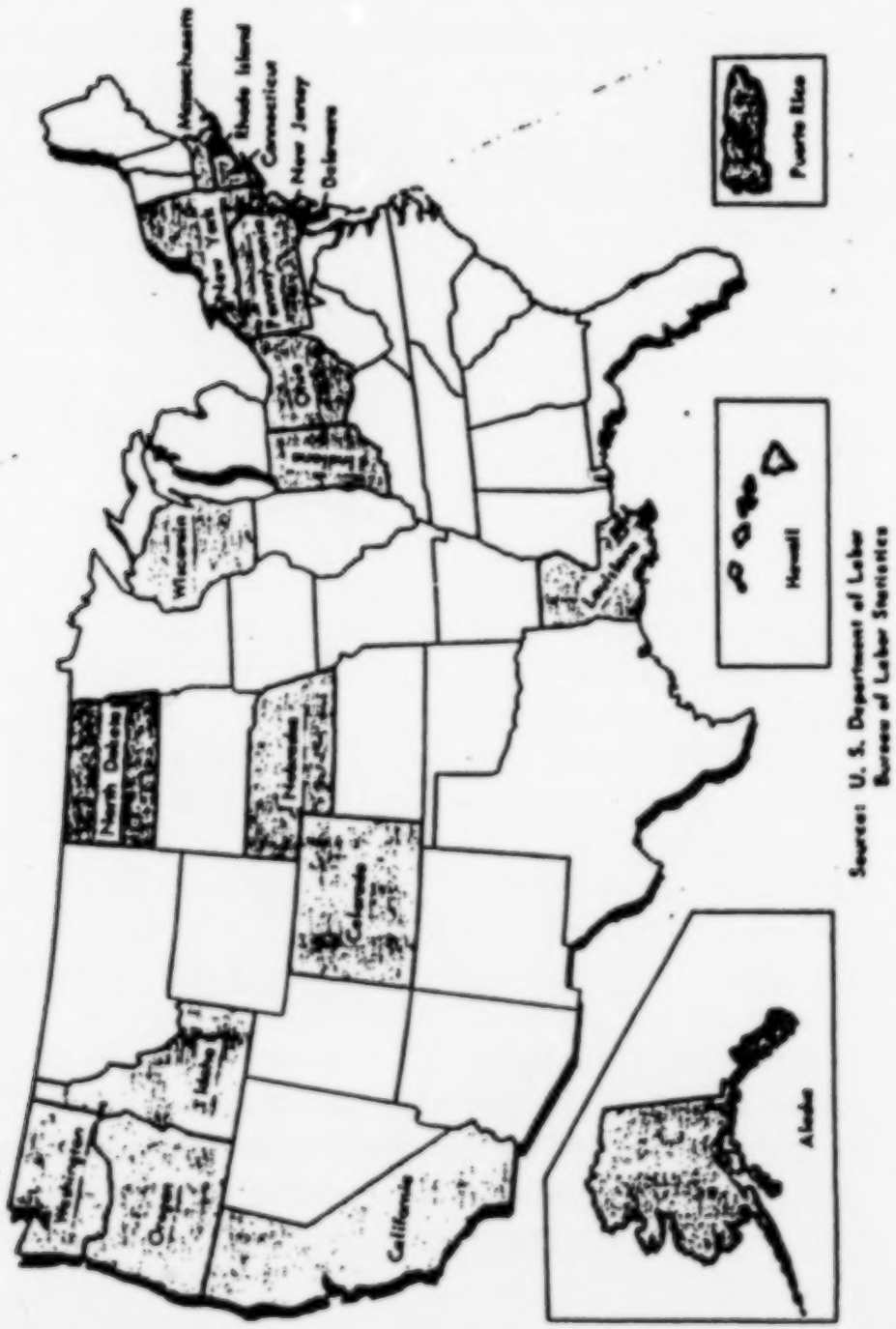
The State laws against discrimination in employment on account of age cover about half of the nonagricultural employment of the U.S. and Puerto Rico:

Colorado (1903)
Louisiana (1934)
Massachusetts (1937 and 1950)
Rhode Island (1956)
Pennsylvania (1956)
New York (1958)
Connecticut (1959)
Wisconsin (1959)
Oregon (1959)
Puerto Rico (1960)
Alaska (1960)
Delaware (1960)
California (1961)
Ohio (1961)
Washington (1961)
New Jersey (1962)
Nebraska (1963)
Hawaii (1964)
Idaho (1965)
Indiana (1965)
North Dakota (1965)

All but three of these laws have been passed since 1955; three were passed in the 1965 legislative sessions. Typically, they apply to employers, employment agencies and labor organizations, with certain exceptions for domestic service, agriculture and small employers. They ban discriminatory practices on account of age, including refusing to hire, discharging, or discriminating in compensation or other terms or conditions of employment. Over half of the States forbid including age limitations in Help Wanted ads or inquiries by employers and employment agencies. Most of these laws are administered as part of Civil Rights legislation.

CHART 2. STATES WITH LAWS PROHIBITING AGE DISCRIMINATION IN EMPLOYMENT, 1965

[Sideways Page customer copy p. 12]



As part of the preparation for this report, a conference of State administrators of age discrimination laws was convened by the Secretary of Labor, in September 1964, to seek their views on the effectiveness of such legislation. This was followed by detailed inquiry into experience in seven States. Experience under these laws is summarized in a special analysis contained in the separate volume of research materials which accompanies this report.

There is clear evidence that in those States where a firm position has been taken, at least the obvious forms of discrimination have diminished, and job opportunities for middle-aged and older workers have increased. The existence of a State law with penalties for violations has made efforts to resolve complaints more effective than has been the case where there have not been such penalties. Age limitations have virtually disappeared from Help Wanted ads in the States which have prohibited them.

However, inadequate funds and staff have limited the effectiveness of these laws in most States. Some have not been implemented at all. In some cases, the broad responsibilities of State agencies to deal with cases of discrimination on account of race, color, or religion, as well as age, have resulted in administrative burdens too large for the staffs that were authorized.

Despite these administrative limitations, the State agencies report numerous cases in which complaints have been adjusted in conferences with employers, with the result that older persons were retained or accepted by employers. More than two-fifths of the complaints from

workers who believed that they had been discriminated against because of their age were found to involve a sufficient degree of arbitrary discrimination to warrant administrative action to bring the employer into compliance.

6. *The Federal Government has adopted a broad and effective policy of nondiscrimination on the basis of age so far as its own employment policy is concerned, and has extended this principle to cover Government contractors.*

The Federal Government's own established policy of hiring on merit through civil Service procedures, without regard to age, is of long standing. Its compulsory retirement age is 70, with occasional exceptions.

Executive Order 11141, issued by President Johnson on February 12, 1964, established a Federal policy against discrimination in employment on account of age by Federal contractors and subcontractors. The Order includes no enforcement provisions and no special administrative machinery for dealing with complaints, providing only that Federal Departments and agencies "take appropriate action to enunciate the policy." Procurement regulations have been amended and the Order has been given wide circulation among larger contractors. Their responses have indicated that the Order stimulated reappraisal of hiring policies respecting age. There have been only a few complaints from individuals and where they have involved violations of the order they have resulted in changes in employer policies.

Executive Order 11141 includes a special provision regarding the elimination of age limitations from employment advertising. A check of Help Wanted ads of Federal

contractors appearing in leading newspapers in 25 cities in the spring of 1965 indicates that less than 5 percent had age specifications.

C. The Necessary Recognition of Forces of Circumstance.

Consideration has been given in the preceding section to the arbitrariness of specific age limitations, indiscriminately applied. It is equally important to recognize the force of certain circumstances which unquestionably affect older workers more strongly, as a group, then they do younger workers.

There can be many reasons why a particular older worker does not get a particular job, and some of them can well be associated with that worker's age. There are differences among people, and some individuals, for a variety of reasons, become less employable as they grow older, just as others become more employable as they grow older.

1. *The health factor is different as between older and younger workers.*

A particular worker may develop a serious health problem which limits his availability for a wide variety of jobs. This health problem would, in the case of a younger worker, have similar effect. But if it is the kind of health problem that is more likely to be serious among older workers, then older workers affected by it are more likely to be rejected for certain jobs on this account.

This in no sense means that it would be reasonable to exclude all older workers from consideration for such

jobs because *as a group* they are more subject to specific health problems associated with growing older. But it does mean that when older workers get considered on their merits, a certain proportion of them fail to qualify.

The medical and psychological findings concerning the abilities of older workers to do specific tasks have already been cited. With increases in the range of individual differences among workers as age advances, it is inevitable that some will fail to meet requirements.

Studies relating health and age have generally found fewer acute illnesses among older than among younger workers, but show that the older ones are more prone to chronic conditions. Chronic conditions may not prevent the employed from continuing to work, but may well result in a higher rejection rate (for example following physical entrance examinations) among unemployed older workers.

The health of the older worker (as well as of the younger) is considerably poorer among the unemployed than among the employed. In 1961-62, days of restricted activity (due to acute conditions) among unemployed 45-64 year olds were twice those of the employed (8.8 versus 4.0). Ten percent of the employed men aged 45-64 had major activity limitations due to chronic conditions; 26 percent of the unemployed had such limitations. Differences between older and younger workers are similarly more pronounced among the unemployed.

2. *The educational attainment of older workers – or the inadequacy of it – is often a bar to their employment for specific kinds of work, either because of inability to meet*

specific job requirements or employer preferences, or because younger workers meet them better.

The fact that most older workers obtain new employment despite rapid technological change indicates the value employers place on their experience, capacities, and stability. But those with inadequate education have far less success in obtaining work than those who are well prepared.

Unemployment rates are inversely related to education in all age groups. Thus, in March 1964, 7 percent of the white male workers 45 years old and over with less than 8 years of schooling were unemployed as compared with 5.4 percent of those who finished elementary school, 2.6 percent of those who finished high school and 1.1 percent of those with 4 or more years of college. The same pattern held true for white women workers.

The pattern for nonwhite workers, though similar, showed less difference because of other factors which result in higher unemployment rates in the nonwhite group regardless of their education: 7.5 percent of the nonwhite men with 8 years of schooling or less were unemployed as compared with 6.3 percent of those who finished high school; percentages for nonwhite women workers in this age group were 6.7 percent and 3.8 percent respectively.

Changes in the nature of jobs and continually rising levels of education have combined to lift employers' educational requirements and preferences. Many older workers now have insufficient education to qualify for the types of jobs which have been growing most rapidly:

medical and dental technicians, nurses, therapists, technical aides in the sciences and engineering, mechanics and repairmen for complex equipment and machinery. Even for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training.

When older workers are displaced from their accustomed work, they must compete with younger, better educated workers. According to the most recent report on educational attainment of workers, that of the Bureau of Labor Statistics for March 1964, three-fifths of those who are 55 years and over have less than a high school education; more than one in five has less than 8 years of schooling. (See chart 3.)

The schooling of about one in ten white and one in five nonwhite unemployed workers 45 years or over is below the literacy level, represented by five years of schooling, a demarcation point used generally among educators. These older workers usually do not even qualify to enter training programs designed to develop new skills or refurbish outmoded ones, under the Manpower Development and Training Act.

That educational handicap is a barrier to employment is confirmed further by Bureau of Labor Statistics studies in 1962 and 1963 of displaced workers in five different industries: petroleum refining, foundries, and manufacturing of automobile equipment, glass jars, and floor coverings. The older displaced workers who completed high school had substantially less unemployment than those who did not. Displaced workers who were not

seeking employment were primarily the less educated group who gave up hope in view of their combined handicap of age and inadequate education. W. H. Franke and the late R. C. Wilcock of the University of Illinois, in their studies in six midwestern cities in 1960-62, reported similar findings. These studies are cited in the research materials which accompany this report.

Many older workers find it strange and difficult to go back to school as they recall it after many years of work and life. The experience of the Employment Service in serving these older people indicates quite clearly that special efforts are needed to help them over the hurdle of going back to some form of schooling – even at an adult level – and special programs under the Manpower Development and Training Act are being designed for this purpose (with the aid of the National Council on Aging). It has also become clear as a result of efforts under the Manpower Development and Training Act that training must be custom tailored and must be accompanied by special job placement and job development assistance.

The Manpower Development and Training Act program (preceded by the training program under the Area Redevelopment Act for depressed areas) is the first national education and training program directed specifically at the training and educational needs of the unemployed throughout the country. While there is now some means of assisting those who are unemployed, there is, as yet, virtually no means of assisting the employed whose education or training is deficient or outmoded – persons as it were, who are not in trouble, but who are heading for it. The Nation's adult education programs do not reach the great bulk of older people either while they are

employed or afterward. Neither offerings nor educational methods are oriented toward the particular needs and interest of older workers in the population.

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CHART 3 THE OLDER THE WORKERS' AGE GROUP, THE LOWER THE LEVEL OF EDUCATION

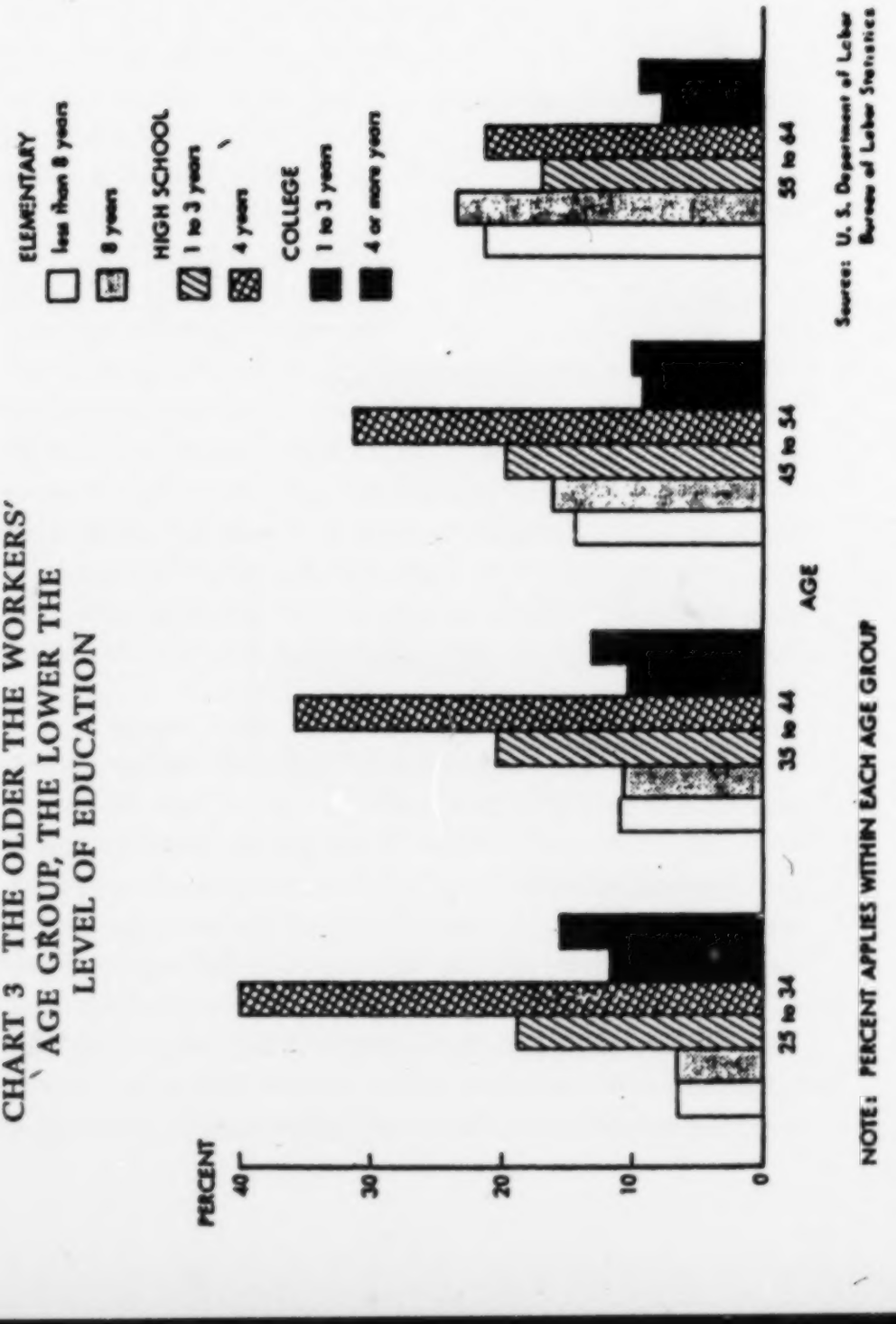


CHART 3 THE OLDER THE WORKERS' AGE GROUP, THE LOWER THE LEVEL OF EDUCATION

3. *Technological change itself affects the older worker's employability, not so much as a factor bearing on individual capacity, but as a significant influence on the environment in which the worker has aged.*

The jobs under new technology are different from those for which the older worker was trained and in which he worked and acquired his experience. Often new jobs are in geographic locations to which younger more mobile workers are attracted; conversely, many older workers are entrenched in areas from which jobs have disappeared.

As new technology displaces older industries and plants and job methods, older workers are especially vulnerable to the changes which follow. Study after study over the last decade has pointed to the same conclusions: those made by Wilcock and Franke, already cited; those made by the Bureau of Labor Statistics; and the experience of the U.S. Employment Service in projects to help displaced workers in cases of plant shutdowns, including the current project in South Bend, Indiana.

Older workers are often in jobs and plants newly established a generation or two ago. Their skills and experience are not always transferable, and the plants and industries which are new today are often geographically distant from the old. As new fuels have supplanted coal, for example, and as coal mining technology itself has improved, older miners have been stranded far from new centers of opportunity. Many of the older consumer goods manufacturing industries have shifted away from the long established centers of population, in response to

new markets and new technology. Older workers displaced as a result of these shifts have often been stranded in the areas of decline. It is the younger workers, less encumbered with family, home, and community associations, who have followed the course of the Nation's industrial advance.

This is true of older workers not only in declining or depressed areas but generally of displaced older workers anywhere when technology changes the character of their jobs or their geographic location. A Bureau of Labor Statistics study of displaced workers from an automotive equipment plant, described in the research materials that accompany this report, illustrates the seriousness of this problem even when transfers to the new locations are offered with full retention of benefits. In this case only one-third of the workers accepted offers of transfer. Many who owned homes had to commute long distances daily to their new work location. Two out of five of those who did not accept transfer were still unemployed 10 months after their layoff.

These changes in technology and in the location of industry have also left older industries with higher than usual concentrations of older workers. In turn, this concentration has given rise to special programs for compulsory or early retirement in "declining" industries – and even in stable or growing industries during periods of economic downturn – designed to open opportunities for younger workers. Moreover, the very availability of Social Security benefits, although yielding only a minimum income (which has to be supplemented from other sources) to workers in retirement, has made it possible to

rationalize involuntary retirements induced for reasons of company manpower or personnel policy.

Further, the development of "special early retirement" incentive programs under private pension plans has opened up additional opportunities for even earlier separation of new groups of older workers. While special benefits are generally offered to induce retirement prior to the normal retirement age, the practice tends to push downward the ages at which employers are willing to employ older workers for new jobs or vacancies.

The pace of technological change, and its effect on the growth and decline of industries, has meant not only changes in the jobs that men hold, but more job changes during their working lives. Workers in the closing decades of this century will have held many more jobs during their lifetimes than did their parents and grandparents. New plants staffed with young work forces may give way to new activity before their workers grow old; a young work force might then come to be regarded as a "normal" work force, and the hiring of older workers as "exceptional."

4. *There is no evidence that unusual numbers of individual older workers fail of selection because of valid advance judgments about expected productivity.*

Obviously individuals in all age groups fail to pass a variety of aptitude and other entrance tests. But there is no evidence that older workers' experiences are different from those of the population generally, except in one respect – the better showing of younger, better-educated workers on tests in which performance is affected by recency of education and testing experience.

Judging expected performance is a difficult task. Wide variations in performance exist among individuals of every age group. All of the studies of job performance of older workers have found this to be true in all of the types of work studied.

Studies made by the Bureau of Labor Statistics of job performance of workers in factory production jobs, in office work, and in mail sorting jobs, for example, show that average performance of older workers compares most favorably in office jobs, where productivity equaled that of younger groups and steadiness of output from week to week rose with age, and compares least favorably in production jobs, where average production declined slightly after age 45, somewhat more markedly after age 55, and substantially after age 65. Among the mail sorters, there was no significant production decline until age 65. Studies by the Canadian Department of Labor of retail sales personnel show that peak performance was reached in the fifties (51-55 in one case and 56-60 in the other).

The Bureau of Labor Statistics studies of production workers also show that individual variation from the average in every age group is substantial, indicating that in each of the groups many workers will be found whose performance may be considerably below the average, as well as above average. Over two-fifths of the men 45-54 years of age, and over 30 percent of the men 55-64 years of age in footwear plants had an output per man-hour greater than the average for the age group 35-44. Conversely, of course, 57 percent of those 45-54 and 68 percent of those age 55-64 had an output equal to or lower than the average for the group age 35-44.

These findings show the injustice of judging workers by the average for the group rather than on the basis of their individual abilities. They also show the futility of using past average performance of an overall group to judge superiority and inferiority of a particular applicant for work.

D. Institutional Arrangements that Indirectly Restrict the Employment of Older Workers

A broad range of personnel programs and practices affect the employment of the older worker, although they were not developed for this purpose. Instituted to bring efficiency, equity, order, and improved fringe benefits, they operate with some force against older workers not within their compass.

1. *The efficient operation of modern business requires specialized personnel administration and established personnel rules.*

This often means rather general rules, and the application of general rules – often a "book of rules" – to individual cases. This is as true of hiring policies respecting age as it is of other matters of personnel policy.

The 1965 Employment Service survey found that hiring policies were preponderantly set by central managements, including personnel officials. Yet in only one case in six was a positive nondiscriminatory policy reported with respect to age. The practice of generalizing personnel hiring policy by arbitrary rules which ignore individual differences is itself a factor that deprives companies of talent and qualified workers of opportunity.

2. *Personnel policies are properly designed to establish an orderly system for assignment and promotion of already employed workers.*

Promotion-from-within policies, accepted as desirable by management and worker alike, very often restrict hiring from outside the firm to lower wage entry levels, traditionally regarded as more suitable for younger workers. Staffing to assure the "age balance" of the work force, or continuity of operation by advance designation of successors, also restricts outside recruitment to low-level jobs and younger workers.

Starting the older worker at a low-level job involves not only age balance, but questions of pay. For the experienced worker an entry job often means a reduction in earnings level. Resistance to such cuts in earnings has been found to limit reemployment opportunities in several case studies of displaced workers. Some refusals to hire older workers were explained on this basis by employers cooperating in the 1965 Employment Service study; in other cases employers were reluctant to offer jobs at pay levels they regarded as appropriate for younger workers. Employers also expressed the view that younger workers could in general be employed at lesser rates of pay.

The question of earnings also arises in the administration of unemployment insurance; workers, particularly those experiencing long periods of unemployment, are counseled to be realistic about earnings horizons, and failure to adjust to realistic levels is often cause for disqualification under State statutes. Under the program of Federal extended unemployment benefits proposed by

the president and contained in H.R. 8282 and S. 1991, greater emphasis is to be placed on such counseling of unemployed workers.

3. *Seniority systems which generally protect older workers in their jobs – because of longer service, not age as such – sometimes operate to impede the employment of other older workers with long industrial service but without recall rights in particular seniority units.*

Where seniority units for layoff purposes are narrow they may result in layoffs of workers who have longer service than workers in other seniority units who are retained. And while older workers are being laid off in one seniority unit, new workers may – under some collective bargaining agreements – be hired in another.

4. *Employer attitudes toward the hiring of older workers are affected by fear of rising costs under recent court decisions interpreting State workmen's compensation laws.*

As a result of court awards for disabilities stemming from pre-existing conditions such as arthritis, heart malfunction, diabetes, and other degenerative diseases that employers had contended were not job related, some employers are becoming reluctant to employ older workers (as well as handicapped workers). Further information on these developments is contained in the research materials which accompany this report.

Neither the operation of the workmen's compensation laws nor of the unemployment insurance systems can be expected to lessen employer concern over such costs. What is involved is a major gap in coverage for

disabilities that are not job related – a gap which itself erects a barrier to the employment of the older worker.

5. *The private pension, health, and insurance plans which have improved the situation of employed workers are probably affecting adversely the hiring of unemployed older workers.*

It is not clear to what extent these restraints arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs. A recent Bureau of Labor Statistics analysis of the costs of these plans, and extensive actuarial calculations covering pension costs, are summarized in the research materials which accompany this report.

Private pension plans now cover more than a third of the nonfarm work force and health and insurance arrangements cover three out of four. There are many types of plans, ranging from pension and health and insurance packages purchased by companies willing to spend specific amounts of money to elaborate self-insured arrangements.

The variety of these plans is paralleled by variations in their costs. Under one important group of pension plans, for example, average annual costs, if calculated separately by age groups, is about $80 a year higher for workers hired in their late forties than for workers hired in their late twenties. This does not necessarily mean, however, that overall costs increase when firms follow policies of hiring older workers. Where vesting of employee pension credits is provided, the differential costs are smaller. Moreover, where benefit formulas are based largely on highest earnings or earnings during the

last few years of service, the ultimate pension costs could be greater for newly hired young employees than for older ones.

Since life insurance plans are group plans, the most important cost factors are the average age and experience of the group. If turnover keeps average age relatively constant, employers are free to hire older workers without added cost.

When insurance costs are calculated by age groups, they are as a whole related to age. The BLS study estimates that for large employers, net insurance premiums after dividends for a $5,000 life insurance policy are almost $3 per month higher for workers 45 to 54 years old than for those under 45, and $8 per month more for workers 55 to 64.

Age is a far less important factor in health care; differential costs basically depend upon marital status and family coverage rather than age. Costs for married workers and their families are about the same for all ages up to nearly 65. For large plans, the net cost for single men – who are less than a third of all nonfarm male employees – although much lower than for married men with families, show differentials of about $3 per month for men 45 to 54, and $5 per month for men 55 to 64, over costs for workers under 45. Accident and sickness plans show similar cost differentials.

The overall cost of a health and insurance program will be affected by experience rating (although this does not apply in a large number of cases), by funding methods, and by hiring policies which affect experience. The cost of a typical health and insurance package for a

company with a hiring policy that concentrates on young workers may prove to be less than that for a company with balanced hiring in all age brackets.

Cost considerations do not, however, always operate against the older worker. Where benefit formulas yield smaller pensions for newly hired older workers the costs are not greatly affected; where central funds are established, as in multiemployer plans, an individual employer's contribution is not ordinarily affected. Similarly, the purchase of group insurance is often handled without regard to changes in the age distribution of the work force, and medical insurance is often purchased from community organizations at communitywide rates. In some cases, special plans have been developed which are neutral with respect to the relationship of cost to age. Older workers are widely hired by employers with pension and insurance plans as well as by those without such plans.

Relatively few employers, in fact, cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons when interviewed during the course of the 1965 Employment Service study of employer hiring practices and policies. Even in cases where they mentioned pension and insurance, cost was not the principal factor involved. Rather, what was cited was the company policy of excluding new employees beyond a certain age from coverage under pension plans – exclusions generally developed because of the time required to build up minimum credits – and in the case of insurance presumed inability to pass physical examinations.

The age exclusions under pension plans vary widely from under age 50 to over age 65; more than a third of them are set at or below age 55. (See chart 4.)

They undoubtedly have an effect upon hiring age limits. Employers in some cases are averse to hiring workers excluded from major fringe benefits. In other situations they are reluctant to provide a reduced and less costly level of fringe benefits. In still other cases they may be reluctance [sic] to provide regular pension benefits if special additional costs would be in involved.

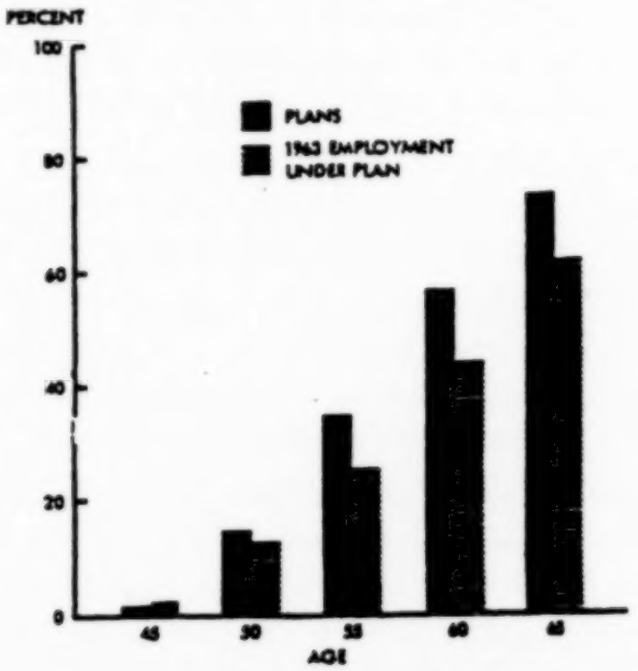
Hiring age exclusions are often lower than pension plan age limits. The lower the established retirement age, the lower the hiring age is likely to be, to allow sufficient time for acquiring pension eligibility and earning an adequate pension. While 65 has been the usual age for normal retirement in most private pension plans as well as in OASDI, there has been some lowering of this age in recent years. In addition, recently negotiated "special early retirement" clauses, which provide higher benefits than "normal" as incentives toward earlier retirement, can accelerate this trend toward earlier retirement, lower further the actual age of retirement, and exert more pressure on maximum hiring ages. In some cases these provisions bar the reentry of workers into certain types of activity, either in the same craft or industry.

The spread of compulsory and automatic retirement provisions has also lowered the age of retirement for many who want to continue to work beyond age 65. About one-third of men retired under OASDI regard their retirement as involuntary, as do about 10 percent of those retired under early retirement plans in recent years,

according to Department of Health, Education, and Welfare and Cornell University surveys.

Provisions which enable workers to carry earned pension credits with them to new employment could aid the reemployment of older workers.

CHART 4. A THIRD OF PRIVATE PENSION PLANS EXCLUDED WORKERS HIRED AT AGE 55 AND OVER HALF AT AGE 60.



Source U.S. Department of Labor, Bureau of Labor Statistics

Vesting provisions are found in about 2 out of 3 plans covering 3 out of 5 workers under private pension plans, according to a recent analysis by the Bureau of Labor Statistics. If vested rights from previous employment were added to the pension credits the older worker

would earn in his new employment, his pension could be considerably higher than could otherwise be provided without added cost. This or other arrangements to facilitate portability of credits could reduce present employer reluctance to hire older workers.

Vesting would also narrow the present cost advantage that favors younger workers, and which arises partly because younger workers, without vesting and with greater turnover, often forfeit their pension rights.

The extent to which the range of pension plan-induced limitations on employment can be considered to constitute arbitrary discrimination is not a simple matter, particularly in the light of the great variations in plan provisions and employer practice. Case-by-case examination is necessary to separate reasonable from unreasonable practice.

The Consequences of Such Discrimination on the Economy and Individuals Affected

The consequences of discrimination embrace a wide range of production loss, human hardship, and frustrations. This may well include the loss of important innovations in the fields of science and technology. Since our society has by no means yet worked out the role to be played by older workers in their later productive years of life, what remains here is an unmeasured as well as untapped resource.

A. The Consequences to the Economy

It is a fair estimate that a million man-years of productive time are unused each year because of unemployment of workers over 45; and vastly greater numbers of years are lost because of forced, compulsory, or automatic retirement.

The total costs to the Nation's economy of the combination of factors which underlie discrimination on account of age cannot easily be calculated. Even where the loss is tangible it is possible to make only very rough approximations; moreover, it is difficult to differentiate the effects of discrimination from other influences.

A substantial portion of the unemployment insurance payments of $1 billion a year to workers 45 and over can be attributed to unemployment resulting in one way or another from the fact of the employee's age. Some of these payments, of course, would go to workers who are between jobs even under conditions of full employment; nonetheless, a large but incalculable proportion involves long-duration unemployment that reflects the difficulty which the older worker faces in attempting to find a new job. The Nation loses, furthermore, potential production in an amount at least two or three times the size of the unemployment insurance payments that might be attributable to discrimination.

It is impossible to estimate what proportion of these costs of unemployment insurance and lost production results form "arbitrary" discrimination, of the kind which might be dealt with by a statute prohibiting discrimination in employment on the basis of age.

Only a hypothetical calculation can be made of the potential contributions of those who have retired involuntarily. Such a calculation would easily yield several billion dollars a year on the assumption that the participation rate for males 65 and over (in either paid or voluntary activity) might rise to a point about halfway between the present labor force participation rate (28 percent) and the 1948 rate of 47 percent (less than half the participation rate for lower ages), and that earnings would not on the average exceed the amounts possible without reduction of OASDI benefits. The fact that about one-third of the men retiring under OASDI regarded their retirement as involuntary – as previously indicated – suggests that these assumptions may not be unreasonable. Moreover, the results of this calculation are similar to those of the late Professor Sumner Slichter who in 1952 estimated $3.8 billion in 1951 prices as a conservative measure of "present loss of production from retired workers."

B. The Consequences to the Individual

The position of the individual older worker, relative to the position of workers in the prime age groups, reflects not only relative disadvantage, but deterioration as well.

The unemployment rate of male workers 45 and over last year was one-fifth greater than the rate in the 35-44 year group.

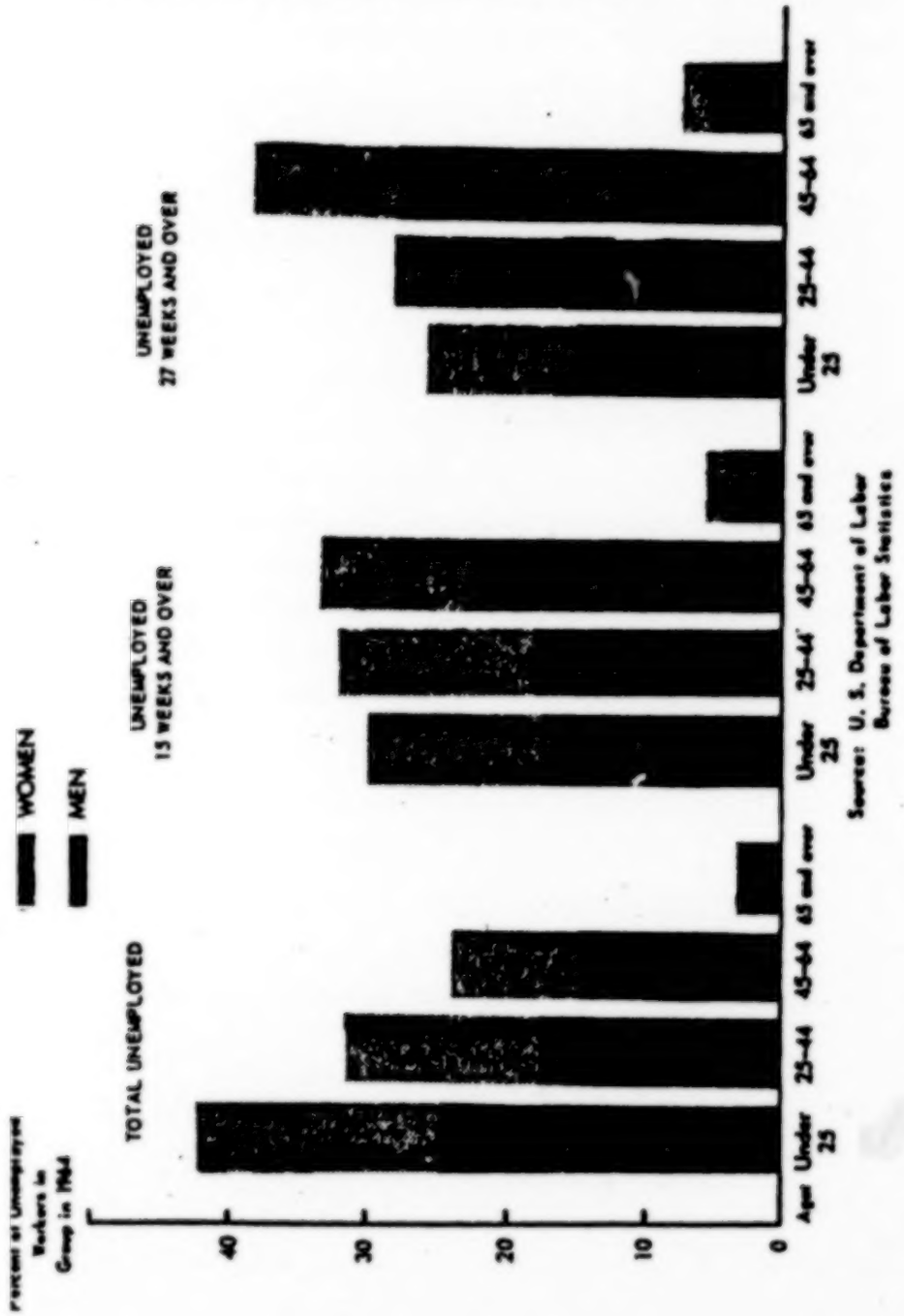
Older workers (45 and over) experienced more long-term unemployment than younger groups. (See chart 5.)

On the average this unemployment lasted 8 weeks longer – about 75 percent longer – than the average duration of unemployment for workers under 45.

The proportion of the very long-term unemployed (over 27 weeks) made up of men 45 and over has been rising in the face of a generally improved employment situation: from 31.5 percent in 1961 to 33.6 percent in 1964 and has begun to improve only in recent months – a lagging improvement of the kind that has in the past generally characterized the unemployment situation of older workers after each period of downturn or inadequate growth.

This development is often accompanied by another kind of deterioration that cannot be measured – deterioration of skill and motivation, with consequent reduced acceptability to employers.

CHART 5. LONG-TERM UNEMPLOYMENT FALLS MORE HEAVILY ON THE OLDER WORKER



Limited literacy and basic education have inhibited the retraining of older workers under the Manpower Development and Training Act. They are in fact badly underrepresented in such training. While workers 45 and over constitute 27 percent of the unemployed, they represent only 11 percent of MDTA trainees. This situation can be remedied to some extent under the literacy amendments to the act. But it will also be necessary to overcome the present administrative inhibitions which arise in part from the MDTA requirement concerning prospective employment opportunity.

The consequences of discrimination on the individuals affected go far beyond those attributable to arbitrary refusal to employ on the basis of age.

They show up in widespread uncertainty concerning the role of rigorous older persons in our society, and in personal frustrations and anxieties. While the opportunity to retire with some income has meant leisure and escape from routine for a great many, it has also created new uncertainties, particularly where *opportunity* to retire has been converted into *forced* retirement, and where there is no new opportunity for satisfying occupation.

While the economic situation of retired workers has steadily improved with the increases in retirement benefits, it is still of great concern that almost one-seventh of the Nation's poverty problem involves low-income persons over 65. The vast majority of older persons have virtually no financial assets to supplement their pensions. Many are barely outside the poverty border: over 40 percent of married couples with one member over 65 had incomes in 1962 of less than the $2500 required to meet

the budget estimated by the Bureau of Labor Statistics as being "modest but adequate" for a retired elderly couple.

III. Conclusions and Recommendations

It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as "arbitrary" and to concentrate on the prohibition of practices which include this element.

A larger, more informed effort is required.

To the extent that arbitrary discrimination occurs, it can and should be stopped.

To the extent that obstacles exist to the employment of older workers because of limitations in their abilities, these abilities must be enlarged.

To the extent that the process of matching men and jobs is working to the disadvantage of older workers, the process must be improved.

To the extent that employment security and income maintenance programs are having a wholly unintended adverse effect on the position of older workers who are unemployed, these programs must be adjusted.

All these things are possible, given a national will and a national effort.

Such an effort will include four types of programs.

First: *Action* to eliminate arbitrary age discrimination in employment.

Second: *Action* to adjust institutional arrangements which work to the disadvantage of older workers.

Third: *Action* to increase the availability of work for older workers.

Fourth: *Action* to enlarge educational concepts and institutions to meet the needs and opportunities of older age.

These recommendations are made pursuant to a Congressional directive that a study be carried out and that the Secretary of Labor report the results of such study and "include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." These recommendations derive only from the directive and the study. They do not constitute proposals by the Administration. Their ultimate consideration will necessarily be as part of a broader balancing with other important measures involving other needs.

Action to Eliminate Arbitrary Age Discrimination in Employment

There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability. The use of these age

limits continues despite years of effort to reduce this type of discrimination through studies, information and general education undertaken by the Federal Government and many States, as well as by nonprofit and employer and labor organizations.

The possibility of new *nonstatutory* means of dealing with such arbitrary discrimination has been explored. That area is barren.

State experience with statutes prohibiting discrimination in employment on the basis of age indicates that such practice can be reduced by a well-administered and well-enforced statute, coupled with an educational program. It is clear from this experience that an educational program to promote hiring on the basis of individual merit is far more effective when provided for by statute.

The elimination of arbitrary age limits on employment will proceed much more rapidly if the Federal Government declares, clearly and unequivocally, and implements so far as is practicable, a national policy with respect to hiring on the basis of ability rather than age.

Such implementation should emphasize the role to be played by persuasion and education, both in general and in individual cases of alleged violations of policy, and should provide for action in the event that persuasion and education fail.

Specific provision should be made for handling instances of *alleged* arbitrary discrimination where the facts of the case indicate that the older worker in question needs reeducation, training, counseling, or health and other services. In these cases the individual should be

referred to the appropriate programs for needed assistance.

While State laws have been increasing in number, some are not implemented at all, and, with few exceptions, the State resources have been inadequate for assuring effective compliance. Activities on behalf of older workers have had a tendency to become submerged in broader programs to prevent discrimination on account of race, color, or religion.

A clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age.

Action to Adjust Institutional Arrangements Which Work to the Disadvantage of Older Workers

To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring.

This will require special arrangements to overcome employer reluctance to hire qualified workers under present pension and seniority arrangements. It will be necessary to modify some existing arrangements, to encourage new kinds of employer and union actions, and to explore additional steps to be taken by the Federal Government.

1. The report of the President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, issued in January 1965,

includes a wide range of recommendations for public policy regarding private pension plans. One important recommendation aimed at wider adoption of vesting provisions in private plans would improve employment opportunities for older workers. Another recommendation which would have long range beneficial effects in this regard called for a study of the feasibility of a system of portable pension credits. These proposals should be given prompt and full consideration.

2. New forms of private annuity coverage for older workers not covered by present private pension arrangements should be encouraged, and consideration given to the status of such annuities under the tax laws. Such arrangements could provide annuity coverage in cases where costs inhibit the hiring of older workers, without requiring the modification of the existing pension plan.

3. A comprehensive formal review of the gaps and inadequacies of present systems of workmen's compensation and disability insurance should be undertaken.

4. Methods should be developed for assisting private parties in collective bargaining to work out procedures which would open opportunities for hiring unemployed workers with long industrial service, while protecting the seniority rights of workers who are already employed.

Action to Increase the Availability of Work for Older Workers

The fundamental fact that will determine the situation of the unemployed older worker is the condition of

the national economy. So long as there exists a considerable body of unemployed persons, the unemployed older worker will be competing for jobs at a disadvantage. By and large, the hard present facts of education, training, and mobility work to the advantage of younger workers. Full employment comes first in any serious intention to eliminate the disadvantages which unemployed older workers must overcome.

Given a high and expending level of employment, however, a vigorous nationwide employment effort, with new and improved arrangements directed at the needs of older workers, is required to provide the special counseling, training, and placement attention that will lead to job opportunities.

The United States Employment Service and the affiliated State services constitute the basic operating resources for getting this job done. Where concentrated efforts have been made in behalf of older workers, the experience of the Employment Service clearly shows that substantial employment opportunities can be developed. But a fully adequate program will require

- additional intensive individual counseling and group counseling with specially trained counselors available for older workers, including veterans (many of whom are now in their forties and fifties) and military retirees;

- the organization of new job-finding community activities, including self-help groups;

- the development of *part-time* employment opportunities;

- referral to appropriate retraining projects and basic education courses, or to other facilities and services such as those provided in the field of vocational rehabilitation or to be provided under the pending Older Americans Act;
- the organization of community efforts to change employers' attitudes toward rigid age restrictions;
- intensification of programs for dealing with mass layoffs from plant shutdown, whether related to changes in defense programs or in civilian production.

It will also require, under the Manpower Development and Training Act.

- larger provision for training and retraining opportunities for older workers, especially through on-the-job training;
- development of new and more effective methods of training adult workers;
- more opportunities for basic education and income supplements to make this education practicable.

To achieve all this will call not only for action in new directions but for special leadership and attention to the problems of the older worker at a key point in the administration of the Nation's manpower programs. This should be a matter given special attention in developing the nationwide employment effort.

Labor and management must be relied on to work out techniques to help older workers meet the requirements of new jobs while they are still employed, and thus forestall the likelihood of unemployment. Several specific

possibilities were emphasized in the 1962 Automation Report of the President's Advisory Committee on Labor-Management Policy:

- planning job changes in advance;
- cooperation between management and employee representatives to meet the problems involved;
- open reporting to the employees involved;
- timing of changes to take advantage of expansion and attrition;
- institution of severance pay programs based on length of service.

Techniques for the advance planning of manpower requirements are being applied in a number of industries, and have been used successfully in several difficult disputes over adjustment to technological change.

Techniques are only beginning to be developed for the redesign of jobs to permit greater numbers of older workers to function effectively and at high levels of productivity.

Techniques are being developed for effective pre-retirement planning which can mean the difference between good and poor adjustment. They encompass financial planning, living arrangements, the managing of money, health problems, and the question of what to do with one's time. They are best carried out at the work location and where possible under joint labor-management sponsorship.

There are many community tasks on which older persons can be employed. There are substantial community needs that have not been met, and for which local

authorities do not have funds. A great deal of this work can be done by older workers, and would be if Federal assistance were available in a form similar to the present financing of the Neighborhood Youth Corps. Community work would recapture and preserve human abilities, utilize manpower, provide satisfying occupation, and forestall additions to the mounting welfare case load.

Local communities should be encouraged and assisted to develop employment opportunities in cooperation with private enterprise as well as through public and non-profit agencies. Participation by private enterprise in the administration of parts of the War on Poverty, in connection with the Job Corps camps and work experience projects, and in the on-the-job training programs under the MDTA and President Johnson's Job Development Program, open new horizons for ingenuity and innovation. There are, and are likely to continue to be, however, tens of thousands of workers with inadequate sources of income and no employment prospects, who are over 55, have exhausted unemployment compensation, and are not yet eligible for retirement benefits. It is not right or reasonable that those whom the economy has displaced at ages between 55 and 65 in the course of technical progress, and whom it will not take back into productive employment, should suffer because of the unavailability of work opportunity. A special program to meet the income needs of this limited group should be considered not only on its own merits but to reduce the growing pressure for a costly early retirement system.

Action To Enlarge Educational Concepts and Institutions To Meet the Needs and Opportunities of Older Age

There is a still broader dimension to all this.

The difficulties of being an older worker are only part of the difficulties of being an older person. There has been too narrow an emphasis on "work," too little recognition of the broader concept of "function" – and the difference gets clearer when an individual's time for work is running out but his capacity, and need, to function continue: Part of age discrimination in employment and part of the answer to it involve this relationship between work and function: for it is wrong to think so much in terms of a person's right or desire to keep on indefinitely at the kind of thing he has always done.

Yet as things now stand, most people's education and their experience are directed largely at what they do during their "lifetime's work" and not at all at what they will do when that work tapers off but a lot of life remains to be lived.

What this study has made clear and this report must convey is the working of two powerful, related, but in a sense opposing processes: men and women are living longer lives than before; but during their lives the world – of ideas, of institutions, of work and function – is changing more rapidly than ever before.

Through most of history, life has been a process of a steadily increasing maturity and growing understanding of the world in which one lives. Suddenly, as life grows

longer, the sum total of human knowledge is compounded faster, the pace of technological progress accelerates – and the process of getting older presents the prospect that as an individual ages he or she will become less, rather than more, familiar with the essential facts of life.

In certain profound ways, people today *diminish* during their lives, in understanding. Today's adult finds the grade school mathematics of his children difficult if not impossible to grasp. H. G. Wells described civilization as a race between education and catastrophe. Acknowledging that to fall hopelessly behind events in middle age is indeed a catastrophe, means facing the further fact that more and more persons are losing that race.

If this appears removed from the issue of age discrimination in employment it is necessary to say plainly that most of those who suffer the worst employment disadvantage with their advancing years are those with the least preparation for the changing demands of those years.

The point has now been reached where almost every boy and girl from age 6 to 16 is in school and a great majority of them finish high school. A much smaller number, about one in four, go on to college, and the evidence is clear that those who do are on the whole well equipped to keep abreast of developments as they go through life. Their education never really stops, or they are at all events able to resume it when necessity or interest indicates that they should do so.

But what about the others, those who leave off their education at high school, or before. The time when a

person could, before he was sixteen or eighteen, acquire a set of skills, or ideas, and make do with them for life, is gone. If anything is certain, it is that most of the members of this group, particularly the wage earners, will sooner or later urgently need further education and training. It is almost an iron law of the coming age, or indeed the present age. Yet there are at present only the most limited arrangements available to provide that education and training. The direct needs of American wage earners, and the larger interests of American society, require that bold thought be directed to means by which we can enable persons who did not attend college in their youth to resume their education on meaningful and productive terms later in their life.

A new system of continuing educational opportunity should be developed for achieving better preparation of our older workers for economic and job changes, to make them less vulnerable to displacement, to protect them against discrimination, and to open the way to more satisfying activity in retirement.

- These opportunities should make it possible for individual workers to receive modern educations which will make up for earlier failure to complete grade school or high school, and should open opportunity for educational and technical refurbishment.

- They should include appropriate financial assistance for limited but adequate periods of time. It will be important to explore a variety of methods by which new types of adult education can be woven into work life.

- The financing of these new opportunities should be a matter of thorough study. Consideration might be given, for instance, to the possibilities of a new system of contributory insurance for educational credits for workers.

A program along these lines, in addition to providing an entirely new horizon of opportunity to those in the work force who are over 45, can also open new job opportunities for others while older workers are on "educational sabbaticals." It can lead to the innovations and economic growth that new combinations of experience and modern education can provide, can furnish a basis for a new type of economic activity, and can be a constructive form of distributing reduced hours of active work in our society. A 1-year educational sabbatical, for example, is roughly the equivalent of a 1-hour reduction in weekly hours over a working life. A 3-month educational sabbatical is equivalent in time to an added coffee break each week of working life.

The basic reply then to the Congress' inquiry about what is required to prevent age discrimination in employment is that there should be provided the opportunity for full *participating* membership in the society until death – and that continuing education is the necessary and only possible qualification for such participation.

All this is not the work of one legislative program, nor of one legislative session, but the time is at hand to go ahead. "Knowledge comes," Tennyson wrote, "but wisdom lingers." We possess the knowledge in general terms of what must be done. This report is offered in the

sincere hope that it will help muster the wisdom to proceed.